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PLEAS OF THE CROWN:

OR, A Methodical Summary OF THE PRINCIPAL MATTERS relating to that Subject.

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THE PREFACE.

THere was lately Publiſhed an Impreſſion, *ſuch as it was, of this Book without any Name of Author to it; but yet was commonly given out to have been Written by the late Chief Juſtice Sir* Matthew Hale, *and ſold for a Book of his Writing. The Original indeed was written by him many years ſince: But that Impreſſion, as it ſeems, was,* from a ſurreptitious and very faulty Copy, *and was accordingly very Faulty and Corrupt throughout in many reſpects, what by* Omiſſions *not only* of Marginal References *very frequently, but of many* intire Paragraphs, *whereby the Book it ſelf is in many places mutilated, as the Reader may eaſily obſerve,* pag. 19, 23, 48, 52, 57, 108, 110, 122, 183, 187, 200, 202, 203, 208. *of that Impreſſion*

compared with this, besides divers other shorter, but not less material Notes left out in other places: What by Omissions and Mistakes of single Words, Sentences, and parts of Sentences, *and sometimes by an unskilful* Critical endeavour *to restore to some sense what those Mistakes had made Nonsense, whereby the Sense is in many places maimed and broken, in some much altered, and in some expressed quite contrary to the Author's words and meaning. Instances whereof the Reader may see in* pag. 2. lin. 17, p. 4. l. 1. p. 7. l. 6. p. 10. l. 17. p. 14. l. 6. p. 15. l. penult. p. 16. l. 13, &c. *the like throughout the whole Book. And what by* Transposition *of divers matters misplaced among other things to which they have little or no affinity or relation, whereby they are not only wanting in their proper places, but the Order and Coherence of those other Matters among which they are interposed, is interrupted and confounded: Thus one half of the Matter belonging to this Title* Process, *which should have been continued* p. 176, *is placed*

p. 191,

p,191,192,193. *under the Tit.* Pleas, *and the greateſt part of the Title* Principal and Acceſſory, *which ſhould have been continued* p. 196, *is there left off in the midſt of a Sentence and placed before at* p. 177. *as if it was the beginning of the Title: and under the ſame Title four Paragraphs together, which belong to* Acceſſories after, *and ſhould have been continued* p. 180, *where in the Original they have a connexion with what immediately preceeds and follows, are placed before at* p. 179, *among what belongs to* Acceſſories before. *Again, the greateſt part of what belongs to the Title* Clergy, *and ſhould have been continued* p.191, *is placed* p.197, &c. *under the Tit.* Arraignment. *To theſe might be added other Faults and Miſtakes, but theſe may ſuffice to ſhew the general corruption of that Impreſſion.*

And though divers of theſe Faults and Miſtakes are not to be imputed to any Negligence *in the Tranſcriber or Publiſher, (whereof notwithſtanding he cannot be acquitted in others) but partly to his* unacquaintance with the

Authors hand; *and partly to his* Ignorance of his way of Writing, *who frequently at the end of his Chapters or Sections used to leave more or less Blank paper, and when other matter occurred, more than could be inserted in those places, did many times write the rest in some other place, where he found most room for it, and for the most part without any Note of reference to it; so that it was very difficult for any, who was not well acquainted with his Writings, to reduce those Transpositions to their proper places; and therefore of the many Copies, which are abroad of this Book, I could never yet see any free from divers such Mistakes; yet by this means (to mention no other) whether through want of Skill, or of Care, or of acquaintance with the Author's Hand and way of Writing, both the Author himself was much injured by the Publication in in that manner, and the Reader also.*

Wherefore to do some Right to the Memory of the deceased Author, and to the Publick, and more particulary in some sort (as far as in respect of

some

ſome Circumſtances was thought fit) *to gratifie the Gentlemen of this Honourable Profeſſion of the Law, who poſſibly may take it ill to be totally deprived of the benefit of the Writings of ſo great a Maſter in it, it was thought good by a Friend of the Authors, (whoſe Care the Author deſired in the Publication of his Writings, after his death) to furniſh the* Bookſeller *with a compleat Copy corrected according to the Author's Original, only what things were therein tranſpoſed, were in the Copy reduced to their proper places, according to his Mind.*

To this end it is fit alſo that the Reader be acquainted, that this Book was Written many years ſince, *about the end of the Reign of King* Charles *the Firſt, or not many years after; was* not *by the Author* intended for the Preſs, *nor fitted for it; and as he ſaith in a Letter to one of his Honourable Brethren, to whom he lent it, was then* never read over *by him* ſince he wrote it, *as the Reader may of himſelf perceive by ſome Faults, which had eſcaped him in writing,*

and remain uncorrected, as p. 8. l. 22. *after the word* Dower *it is apparent that the word* [ſaved]* *or ſome ſuch is wanting (which in the former Impreſſion was endeavoured to be amended, but not without diminution of the Author's meaning) and ſome others, which are left to the Reader to correct according to his own Judgment, a Method often approved by the moſt judicious Criticks in the publiſhing of other mens Writings, and for ſome ſpecial Reaſons at this time thought fit to be obſerved in this.*

But leſt while we endeavour to do Right to the Author, we ſhould do Wrong to his Book, the Reader muſt alſo know, that notwithſtanding what hath been ſaid, this Book hath been well accepted and eſteemed by divers of the moſt Eminent Lawyers, who much deſired and obtained of the Author himſelf to have Copies of it many years ſince. And though probably the Author never at all read it entirely over after he wrote it, yet it is certain he many years after made divers occaſional Additions to it: and,

if

f I be not much miſtaken, he did uſually carry it with him in his Circuits.

He hath written a large Work upon this Subject, Intituled, An Hiſtory of the Pleas of the Crown, *wherein he ſhews what the Law anciently was in theſe matters, what Alterations have from time to time been made in it, and what it is at this day. He wrote it on purpoſe to be printed, finiſhed it, had it all tranſcribed for the Preſs in his life-time, and had reviſed part of it after it was tranſcribed; but whether, or when it will be publiſhed is uncertain. In* This *he doth ſummarily relate what the Law is at this time, or rather was when he wrote it, for ſome Alterations it hath ſince received, though not many, by ſome late Statutes; and therefore may not only be of uſe till that be publiſhed, but may alſo continue of good uſe after that is publiſhed, whenever it be, as the moſt proper* Introduction *for Students to this part of the Law that is extant, and as a Synopſis or Epitome of the moſt uſeful part of that.*

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A Table of the Titles, and Method of the Book.

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Notes

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C.M.Car. *Coke upon Magna Charta.*
C.Weſt.1. *Coke upon W.*1.
C.PC. *Coke's Pleas of the Crown.*
Com. *Plowden's Commentaries.*
Cr.*and* Crom. *Crompton.*
Dal. *Dalton's Juſtice.*
Dy. *Dyer's Reports .*
Kel. *Kelway's Reports.*
Lamb. *Lambart's Juſtice.*
S.PC. *Stamford's Pleas of the Crown.*
4 R. *Coke's fourth Report.*
9 R. *Coke's ninth Report.*

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PLEAS
OF THE
Crown.

THis Treatiſe (is) divided under theſe Conſiderations:

1. Of the *Kinds* of Offences.

2. Of the *Incidents* unto theſe Offences.

The *Kinds* of the Offences are diſtinguiſhed according to the diverſity of the Laws by which they are introduced, *viz.*

Offences by the Common Law.
Offences by the Statute.

Offences *by the Common Law*, distinguished according to the degrees of the Offence.

- Capital.
- Not Capital.

Of *Capital* Offences, they are such,

1. As are immediately against God.
2. Immediately against Man.

Those that are Offences *not Capital* by Common Law, as Misprisions, Maihem, Breach of the Peace, &c.

Offences *by the Stat.*
- Capital.
- Not Capital.

The latter are many, and not here to be treated of.

Heresie.

Hereſie.

1. NOw firſt concerning Offences *Capital*, that are *immediately againſt the Divine Majeſty*, which are

Hereſie,
and
Witchcraft.

1. Concerning *Hereſie*, wherein conſiderable,

I. *What* is Hereſie?

At this day all thoſe former Acts which determined certain Points to be Hereſie, ſtand repealed; and though there be no expreſs Act determining what ſhall be ſaid Hereſie, yet the Statute of 1 *El. c.* 1. directing the High Commiſſion, reſtrains it. C Pl c.5. St.1 El.c.1.

1. To what formerly determined Hereſie, by the Authority of the Canonical Scriptures.

2. To what adjudged ſo by the firſt four General Councils.

3. To what expreſly adjudged

Hereſie by any other General Council by expreſs words of Canonical Scripture.

4. To what ſo determined by Parliament by aſſent of the Convocation.

II. Who to *judge of* Hereſie?

1. The Temporal Judge cannot puniſh any Perſon for Hereſie by Indictment, or otherwiſe:

But yet incidently he may take knowldge whether a Tenet be Hereſie, or not: As where by force of the *Statute* of 2 *Hen.* 4. now repealed, *Keſar* was committed for ſaying, *That though he were Excommunicate by the Archbiſhop, he was not ſo before God:* and *Warner* Committed for ſaying, *Non tenetur ſolvere decimas*, and thereupon impriſoned: In a *Habeas Corpus* by the former, and a ſpecial Juſtification in an Action brought by the latter, adjudged neither Hereſie.

M. 5 E. 4. Rot. 143. coram Rege.

M. 11 H. 7. R. 327. C. B.

2. All the *Statutes* that gave power to Arreſt or Impriſon for Hereſie, *viz.* 2 *Hen.* 4. 15. 2 *Hen.* 5. 7. 5 *Rich.* 2. *c.* 5. 1 and 2 *Ph.* and

and *Mar. c. 6.* are repealed by 1 *Eliz.*

III. The way to convict of Hereſie.

1. By the Common Law.

1. By the Archbiſhops and Biſhops in a General Synod.

2. By the Biſhop of the Dioceſe.

2. By the *Stat.* 23 *H. 8. c. 9.*

By the Archbiſhop in caſe of the aſſent or neglect of his Suffragan.

IV. The *Puniſhment* of a Party convict of Hereſie.

Upon Certificate of ſuch Conviction, a Writ *De Hæretico Comburendo* granted, without which they cannot proceed to any temporal Puniſhment.

But if after Conviction he abjure his Opinion, his life (is) ſaved.

But if he relapſe after Abjuration, then irrecoverable.

§. But (by) the *Statute* of 2 *H. 5. c. 7.* all *Statutes* which introduc'd any Forfeiture ſtand repealed: Neither did the Common Law inflict any Forfeiture, becauſe the proceeding was only *pro ſalute animæ.*

Witchcraft.

AT Common Law Witchcraft is punished with death, as Hereſie, by Writ, *De Hæretico Comburendo.*

C.P. c.6.

The Statute of 1 *Jac.* 12. the only Law now in force againſt it, and divides it into *two Degrees:*

I. Witchcraft in the *firſt Degree* made Felony without benefit of Clergy, including *four Species:*

1. *Invocation* or Conjuration of an Evil Spirit.

2. *Conſult, covenant* with, *entertain, employ,* feed, or reward any Evil Spirit to any intent, (though no act be done thereupon.)

3. *Take up* any *dead Perſon*, or any part thereof, to be employed or uſed in Witchcraft, Charm, &c. (though not actually uſed or employed.)

4. Exer-

4. Exerciſe any Witchcraft, Inchantment, Charm, or Sorcery, whereby *any Perſon* ſhall be *killed*, deſtroyed, conſumed, or *lamed* in his or her Body, or any part thereof (which requires the act to be done, *viz.* laming, conſuming, &c.)

Theſe and all Acceſſary before, to ſuffer as Felons without Clergy: But Acceſſaries may be after; but then they have Clergy, becauſe not ſpecially excluded.

II. Witchcraft in the *ſecond Degree.*

1. (To) *take upon them* by Witchcraft, Inchantment, Charm, or Sorcery *to tell where* Treaſure is to be found: They that take upon them to do it, though they cannot, yet within this Law.

2. Or where Goods (loſt) or ſtolen may be found.

3. Or to the intent to *provoke* any Perſon *to unlawful Love*; theſe Clauſes come under the word [*taking upon.*]

4. Whereby *Goods or Cattel* ſhall be *deſtroyed* (which requires an actual deſtroying, and not a bare taking upon them.)

5. Or ſhall uſe Witchcraft, *&c. to hurt any Perſon*, though the ſame be not effected.

The *Puniſhment* of theſe,

1. The firſt Offence, a years Impriſonment and Pillory.

2. The ſecond Offence, Felony. But this requires:

1. An Actual Conviction and Judgment for the firſt.
2. The ſecond Offence muſt be committed after the Judgment for the firſt.

The like in Forgery, Tranſportation of Sheep, &c.

But the Conſequents upon an Attainder, *viz.* Corruption of Blood, and loſs of Dower: But during life the Lands forfeit.

And Note, a Saving againſt Corruption of Blood preſerves the Deſcent; and a ſaving of the Land to the Heir prevents Corruption of Blood.

High

High Treaſon.

CONcerning Offences *againſt Man* immediately diſtinguiſhed in their Judgment or Event: Capital, or not Capital.

Capital, either by the Common Law or the *Statutes*; and theſe either Treaſon or Felonies.

Treaſon, either { High Treaſon, or Petit Treaſon.

High Treaſon: and this though an Offence at Common Law, yet becauſe there be ſome mixtures of Introductions of new Treaſons by *Statute*, would be conſidered together.

1. Conſidering High Treaſon, it is diſtinguiſhed into *four kinds:*

1. That which concerns immediately the King, or his Wife or Children.

2. That

2. That which concerns his Officers in the Adminiſtration of Juſtice.
3. That which concerns his Seal.
4. That which concerns his Coin.

Before we come to the Particulars, ſome things to be generally *premiſed.*

1. That thoſe that have any ſuch diſability upon them, that diſables them to act reaſonably, cannot commit Treaſon, *viz. Non compos mentis*, and Infants within the Age of diſcretion.

And therefore if a Traytor becomes *Non compos* before Conviction, he ſhall not be Arraigned; if after
C.P. fo. 4. Conviction, he ſhall not be executed.

An Alien Enemy, committing any hoſtile act, dealt with as an Enemy: an Alien *amy* committing any Treaſon, a Traytor within the Law.

2. The *Statute* of 25 *E.* 3. reduced and ſetled all Treaſons; and by that means all Treaſons that were before

before are reduced, and the *Stat.* of 1 *Ma. c.* 1. reinforced the *Statute* 25 *E.* 3. and reduced all new Treaſons unto the old Standard of 25 *E.* 3. and ſo all new Treaſons declared between 25 *E.* 3. and 1 *Ma.* abrogated.

3. All Treaſon includes Felony; C. Pl. 15. therefore if the Indictment want *proditorie*, a Pardon of all Felonies diſcharges it.

Now concerning *the kinds* of High Treaſon.

1. *Compaſſing* and imagining *the death* of the King, Queen, or Prince, and declaring the ſame by ſome open Deed.

I. What (is) a *Compaſſing* the death?

Declaring by an open act a deſign to Depoſe or Impriſon the King, is an Overt act to manifeſt a compaſſing of His Death.

Calculating Nativity *de Roy nemy* compaſſing.

II. What a *King?*

1. A King before his Coronation, a King

a King within this *Statute*, when the Crown deſcends upon him.

2. A King *de facto*, and not *de jure*, a King within this Act, and a Treaſon againſt him puniſhable, though the right Heir get the Crown.

3. A Titular King, that is not Regnant; as the Husband of the Queen regnant, not a King within the Act. *Vid.* 1 & 2 *Ph.* & *Ma. c.* 10. but the Queen is.

4. The right Heir to the Crown, yet not in Poſſeſſion thereof, is not a King within the Act.

III. What the *King*'s *Wife*?

It extends not to a Queen Dowager.

IV. What the *eldeſt Son and Heir* of the King within the Act?

The ſecond Son, after the death of the eldeſt, within the *Stat.*

The eldeſt Son of a Queen Regnant within the *Statute*.

The Collateral Heir apparent, as *Roger Mortimer*, 11 *R.* 2. the Duke of *York* 39 *H.* 6. not Son and Heir, within this Act.

V. What

V. What an *Overt act* requiſite to make ſuch compaſſing Treaſon?

1. An Overt act muſt be alledged in every ſuch Indictment, and proved.

2. Compaſſing by bare words is not an Overt act, as appears by many temporary *Statutes* againſt it: 26 *H.*8.*c.*13. 1 *El.c.*6. 13 *El.c.*1. 14 *El. c.* 1, *&c.* but the ſame ſet down by him in writing is an Overt act.

3. Conſpiring the death of the King, and providing Weapons to effect it, or ſending Letters to ſecond it; aſſembling People to take the King into their power; Lord *Cobham*'s Caſe; writing Letters to a Foreign Prince inciting to Invaſion; an Overt act.

4. Conſpiring to levy War no Overt act, unleſs levied, becauſe it relates to a diſtinct Treaſon.

II. Treaſon *levying War* againſt the King.

1. A conſpiring or compaſſing to levy War, without a War *de facto*, no Treaſon; but if a War levied, the Conſpirators Traytors as well

as

as the Actors: This appears by the *Stat.* 13 *El. c.* 1. that made such Conspiracy to levy War, Treason during the Queens life.

2. A raising a Force to burn or throw down a particular Inclosure, only a Riot; but if it had been to go from Town to Town, and cast in all Inclosures, *Bradshaw*'s Case; or to change Religion, or to inhance the Salaries of Labourers, a levying of War, because the End publick.

3. Joyning with Rebels *pro timore mortis, & recesserunt quam cito potuerunt*, no levying War. *Oldcastle*'s Case.

4. Holding a Fort or Castle against the King's Force, a levying of War.

III. Treason *Adhering to the King*'s *Enemies*, giving them Aid within the Land and without.

1. What *Adhering?*

1. Giving Aid and Comfort to them.

2. Surrender the King's Castle for reward.

2. What

2. What an *Enemy?*

1. The Subject of the King becoming a Rebel, he that out of the Realm ſuccours him, this not adhering to an Enemy within this Clauſe.

2. An Enemy coming hoſtilely into *England*, ſhall be dealt with as an Enemy, executed by Marſhal Law, or ranſomed; but a Subject aſſiſting him ſhall be dealt with as a Traytor.

3. The *Scots* invading *England* in the Queens time adjudged Enemies, though *Scotland* then in Amity. Lord *Herri's* Caſe.

3. *Within the Land* or without, how that Foreign Treaſon ſhall be tried.

1. At Common Law for a Foreign Treaſon, the Indictment and Trial muſt be where the Land lies.

2. By the *Stat.* 35 *H.* 8. *c.* 2. which is yet in force, it may be inquired of and tried in *B. R.* or by Commiſſion in any County where Dy. 298.

where the King appoints; the King's Signature may be either to the Commiſſion or the Warrant thereof.

Treaſon done in *Ireland* is within that *Statute*, *Perrot*'s Caſe.

Trot. Ab. p. 382.

3. By the *Stat.* 28 *H.* 8. *c.* 15. Treaſon upon the Sea inquirable and triable by Commiſſion in any County; at Civil Law it muſt be before Lord Admiral.

IV. Treaſon, *Violation* of

1. The King's Wife, extends not to a Dowager.

§. If ſhe conſent 'tis Treaſon in her.

2. The Prince's Wife.

§. The ſame Law as before.

3. The Kings eldeſt Daughter then living.

Thus far of Treaſons that relate to the King's Perſon and neareſt Relations, wherein generally,

1. There muſt be an Overt act to manifeſt that Offence.

2. That muſt be made appear by manifeſt Proof, and not by conjectures.

3. He

3. He muſt be lawfully attaint thereof, either by Confeſſion, or by his Peers in his life time.

And therefore if a Perſon be ſlain in open War he forfeits nothing, neither can he be attaint in ſuch caſe, but by Parliament.

2. Thus far of Treaſons relating to the King immediately; now follows that which is *Interpretative Treaſon.*

§. *Killing* the Chancellour, Treaſurer, Juſtice of one Bench or other, Juſtice in Eyre, or of Aſſize, or Oyer and Terminer in their place, doing their Offices.

1. This *extends* but to the Perſons here named, not to the Lord Steward, Conſtable, or Marſhal, or Lords of Parliament.

2. It extends to theſe only doing their Office.

3. It extends only to a killing, not a wounding without death.

But by *Stat.* 3 *H.* 7. *c.* 14. compaſſing to kill the King, or any of his Council, made Felony.

3. *Counterfeiting* the Great Seal, or Privy Seal.

1. It muſt be an actual Counterfeiting: Therefore compaſſing to do it, no Treaſon.
2. Affixing the Great Seal by the Chancellor without Warrant, no Treaſon.
3. Fixing a true Great Seal to another Patent is a great Miſpriſion, but not Treaſon; nor a Counterfeiting within this *Statute*, 2 *Hen.* 4. 25.
4. Aiders and Conſenters to ſuch Counterfeiting are within this Act.
5. The Counterfeiting of the Privy Signet or Sign Manual not Treaſon within this Act, but made ſo by the *Statute* of 1 & 2 *P. M.* c. 11.

V. Treaſon concerning the *Coin*.

1. *Counterfeiting* the King's Coin. This was Treaſon at Common Law, but yet the Judgment was only as in caſe of Petit Treaſon; this being but affirmance of the Common Law. Vide, Si Mr. de Mint fait memi allay, &c. eſt Treaſon. 3 H. 7. 20.

But whereas *Clipping*, *&c.* is made High Treaſon by ſubſequent *Statutes*, the Judgment is to be hang'd, drawn, and quartered, becauſe introductive of a new Law.

Herein conſiderable:

1. What ſhall be a *Counterfeiting*? Clipping, Waſhing, and Filing of Money for lucre or gain, any of the proper Money of the Realm, or of other Realms, allowed to be current by Proclamation, not Within this *Statute*, but made High Treaſon by *Stat.* 5 *El. cap.* 11. but no corruption of Blood, or loſs of Dower.

Impairing, Diminiſhing, Falſifying, ſcaling or lightening the proper Money of this Realm, or the Money of any other Realm

made current by Proclamation, their Counſellors, Conſenters and Aiders within neither of the former, but made Treaſon by the *Stat.* of 18 *El.* 1. but without corruption of Blood, or loſs of Dower.

2. What his *Money?*

This extended only to the proper Money of this Realm:

But now,

1 *Ma. c.* 6. Forging or Counterfeiting Money made *current* by Proclamation, is High Treaſon.

14 *El. c.* 3. Forging of Foreign Coin, *not current* here; Miſpriſion of Treaſon in the Forgers, their Aiders and Abettors.

And Note, The *bare forging* of the King's Coin, without uttering, is Treaſon. 6 *H.* 7. 13.

Mes uttering de faux Money fait deins le Realm ſciant ceo deſtre fals eſt ſolment Miſpriſion de Treaſon, 3 H. 7. 19. *Iſſint Receiving, Aiding, &c. ceſtuy que ad counterfeit,* Dyer 296.

Nota,

Nota, *Eſt grand Miſpriſion*, *mes nemy Miſpriſion de Treaſon*, *& iſſint reſolve* 1661.

2. The ſecond offence concerning Money declared Treaſon, is, if any Perſon *bringing into the Realm* counterfeit Money.

1. It muſt be Counterfeit.

2. Counterfeit to the ſimilitude of *Engliſh* Money.

3. Brought from a Foreign Realm, and therefore not from *Ireland* barely.

4. Brought knowingly.

5. Brought in, and not barely uttered here: But if falſe or clipt Money be found in his hands, by the Statute *De Moneta*, if he be ſuſpicious, he may be arreſted till he have found his Warrant.

6. He muſt merchandize therewith, or make payment thereof.

Certain High Treaſon made by ſubſequent Statutes in force.

5 *El. c.* 1. Refuſing Oath of Supremacy upon the ſecond tender, Treaſon, without corruption of Blood.

Extolling power of Biſhop of *Rome* Premunire, 13 *El.* 2. *c.* 2. Bringing in Bulls, or putting in execution, or reconciling to the See of *Rome* thereby, Treaſon.

Bringing in *Agnus Dei*, &c. Premunire, 1 *El. c.* 1. Vide *Dyer* 282.

§. 23 *El. c.* 1. Abſolving Subjects from Obedience, or reconciling them to Obedience of *Rome*: Treaſon in Reconciler and Reconciled.

§. 27 *El.* 2. Prieſt coming into the Realm, not ſubmitting in two days, Treaſon. The like for *Engliſh* in foreign Seminaries.

Petit

Petit Treaſon.

IS confined by *Stat.* 25 *E.* 3. to three *Particulars* :

1. Where a *Servant kills* his Maſter.

This extends to ſome other Caſes:

1. Servant kills his Miſtreſs.
2. Servant kills his Maſter's Wife.
3. Where a Servant, upon Malice taken during his Service, kills his Maſter after departure from his Service.

2. *Wife killing* her Husband.

If the Wife and a Stranger kill the Husband, petit Treaſon in the Wife, Murther in the Stranger.

If the Wife or Servant procure a Stranger to kill her Huſband or Maſter, the Procurer Acceſſary only to Mur-

der: But if ſhe procure a Servant to do it, Treaſon in both.

3. *Eccleſiaſtical Perſon*, Secular or Regular, kills Superiour.

Note, Aiders and Abetters, and Procurers to Petit Treaſon are within this Act.

V.C.P. 20. This Act not taken by Equity.

Crom. 18. Dal. c. 91. H. 5 Car. *Doddington's* Caſe. Yet Son kills Father or Mother, it is Petit Treaſon, receiving Meats, Drink, or Wages.

The *Judgment* in Petit Treaſon, for a Man to be hang'd and drawn.

Crom. 18. A Woman to be burnt.

Whatſoever will make a Man guilty or principal in Murther, will make a Man guilty or principal in Petit Treaſon.

Dal. 1. 91. But if the Servant kill the Maſter upon a ſudden falling out, this is not Petit Treaſon, but Manſlaughter.

Crom. 19. *Rigg's* Caſe. If the Servant or Wife be of Confederacy to kill the Husband or Maſter, and be in the ſame Houſe, though not in the ſame Room, they are principals and guilty

ty of Petit Treaſon, for it is a preſence.

Servant tue Mr. per procurement le Feme abſent: Il eſt Petit Treaſon in Servant, & Acceſſory al Petit Treaſon in Feme. 2. Si Eſtr. fait ceo per procurement Feme ou Servant: eſt Murder in l' Eſtr. & Acceſſory al Murder in Feme ou Servant. 3. Si Eſtr. fait ceo per procurement & in preſence de Feme ou Servant: eſt Pet. Treaſon in Feme ou Servant, & Murder in l' Eſtr', Dy. 128, 254, 332.

Of

Of Felonies: And, 1. *Of Felonies of the Death of a Man.*

THus far of High and Petit Treaſon.

Now for Felonies, they are either: by Common Law, or by Statute.

Felonies *by Common Law:* And they are of four *kinds:*

1. Such as are committed againſt the Life.

2. Such as are againſt the Goods of a Man.

3. Such as are againſt the Habitation of a Man.

4. Such as are againſt the Protection of Publick Juſtice.

Felonies committed *againſt the Life*, of two Natures.

1. That which is committed againſt his own Life, *Felo de ſe.*

2. Committed againſt anothers Life:

1. Involuntary.

1. *Per*

1. *Per infortunium*, and therein of *Deodands*.
2. *Per neceſſitatem*.

In defence of Juſtice.
In defence of ſelf.

2. Voluntary, without Malice.
With Malice.

Felo De Se.

1. THe *Perſon.*
   1. As in other Felonies, ſo in this, the Perſon that commits it muſt be of age of diſcretion, and *Compos mentis*; otherwiſe no Forfeiture: Therefore if a Lunatick, during his Lunacy, a Man diſtract by force of Diſeaſe, or *Non compos*, kill himſelf, no Felony.
   2. As in other Felonies, the death muſt enſue within a year and a day after the ſtroke, &c.
2. The *Act* may be voluntary.
   Involuntary in ſome caſes.

St. P. C. 16. Dalt. c. 92.

If *A.* aſſault *B.* and *B.* falling down with his Knife drawn, *A.* in purſuit to kill, *B.* by haſte falleth upon the Knife, *A.* is *Felo de ſe*, and forfeits his Goods.

But

But if *B.* were ſtanding in his Defence with his Knife drawn, *A.* runs upon the Weapon and kills himſelf, *A.* is not *Felo de ſe.* C.P.C. p. 54.

3. The *Conviction.*

1. If the Body can be ſeen, then the Conviction before Coroner, *ſuper viſum Corporis,* and not traverſable.

2. If not ſeen, then before the Juſtices of the Peace, and then traverſable by the Executor or Adminiſtrator. C.P.C. 55.

In the ſame manner, if enquired in *B. R.* in the ſame County, traverſable.

4. The *Forfeiture:*

1. When? By the Conviction.

2. How relating? To the ſtroke.

Therefore, Villain gives himſelf a mortal ſtroke; Lord ſeiſeth Goods; Villain dies; King ſhall have them.

3. Of what?

Joint things intire, all forfeited, unleſs in caſe of Merchants. C.P.C. 55.

Joint things ſeverable, Moiety forfeit.

But

But Joint Chattels in Husband and Wife, all Forfeit for this Offence of Husband.

Chance-

Chancemedley.

FElony for the death of another, either involuntary, or voluntary.

Involuntary *per infortunium*;
Ex neceſſitate.

Involuntary *per infortunium.*

Chancemedley, where a Man doing a lawful act, without intent of hurt to another, and death caſually enſues:

As, ſhooting at Rovers, or at a Bird, or hewing a Tree, and the Hatchet-head flies off.

A School-Maſter in reaſonable manner beating a Scholar, or Father his Son, or Maſter his Servant. Cr. 26.

Doing a lawful thing that may breed danger, and giving warning; Juſting by command of the Prince.

But if the Act be unlawful, then death enſuing, Manſlaughter or Murther.

Shooting at a Deer in anothers Park, the Arrow glanceth and killeth a ſtander-by, Manſlaughter. C.P.C.56.

Throw-

Throwing ſtones, or ſhooting in the High-way, and death enſuing, Manſlaughter.

C. P. C. 57. But if a Man, knowing People paſſing by in the Street, throw a ſtone over the Wall, Murther.

Dalt. c. 96. Playing at Hand-ſword, without command of the King, death enſuing, Manſlaughter.

So that an unlawful act, without an ill intent, Manſlaughter; with an ill intent, Murther.

St. P. C. c. 15. And this cauſeth forfeiture of Goods; but a Pardon of Courſe upon the Special Matter found.

Deodand.

Deodand.

BUt there is a Death *per infortunium*, without the default or procurement of another: Fall from a Tree, or by a Horſe or Cart; and there the thing that occaſions the death is Forfeited and *Deodand:* Wherein conſiderable,

1. *What Forfeited* as a Deodand.

1. If a Man fall from a Cart, or from a Ship in Freſh water, it is a Deodand: Otherwiſe in Salt water. C. PC 58.

2. If an Infant under fourteen be ſlain by fall from a Cart, Horſe or Mill, no Deodand; but if ſlain by a Horſe, Ox, or Bull, then a Deodand.

3. If a man kill another with any Sword, a Deodand. Dalt. Inſt. c. 97.

2. *When* Forfeited, *viz.*

When found by Inquiſition, therefore the Jury ought to find Dalt. c. 97.

the price; and this is before Coroner.

3. The *Relation* of the Forfeiture is to the ſtroke.

Homicide.

Homicide ex Neceſſitate.

THis of ſeveral ſorts:

1. In reference to Juſtice.

2. In defence of his Perſon, Houſe, Goods.

Homicide *ex neceſſitate.*

§. 1. *In reference to Juſtice*, of ſeveral kinds:

1. In execution of Juſtice.

2. In advancement of Juſtice.

Homicide *in execution of Juſtice* requires certain Preſcripts.

1. That the Judgment be given by one that hath Juriſdiction in the Cauſe.

If a Juſtice of Peace give Judg- Dal c.98.
ment in Treaſon, the Execution thereof Murther in Judge and Officer.

But if he give Judgment of death in Treſpaſs, Felony in the Judge, but not in the Officer that executes it.

2. That it be done by a lawful Officer.

Therefore, if a Stranger of his Dalt.c.98.

own head, or the Judge that gives the Judgment, Execute it, where it is to be done by the Sheriff, Felony.

3. That it be done purſuant to the Judgment.

S.PC.c.4. Judgment to be hang'd, Sheriff beheads him, Felony.

2. Homicide *in advancement of Juſtice* in Cauſes,

{ Criminal. / Civil.

1. In Cauſes *Criminal*.

Dalt.c 98. If a Sheriff or Bailiff, having warrant to arreſt a Perſon indicted of Felony, and he will not obey, or ſuffer himſelf to be arreſted, the Bailiff kills him, no Felony.

Cro. fo.27. The ſame, if any Perſon that purſues upon Hue and Cry, or otherwiſe to arreſt a Felon that flies.

C.PC 22. If a Felon arreſted break away from his Conductors to Gaol, they may kill him, if they cannot otherwiſe take him.

But

But in this latter Caſe there muſt be a Felony done.

If a Priſoner aſſaults his Gaoler, and he kill the Priſoner, no Felony.

Rioters, or Forcible Enterers or Deteinors, ſtanding in oppoſition to the Juſtice's lawful Warrant, and one of them ſlain, no Felony.

Keeper or Parker may kill Hunters, if they fly or defend themſelves. Cro. fo. 28.

Champion in bre de Dret, ou Combatant in Appele, excuſe in killing the other.

2. In *Civil* Cauſes.

Though Sheriff cannot kill a man who flies from the execution of a Civil Proceſs, yet if he reſiſt the arreſt, the Sheriff or his Officer need not give back, but may kill the Aſſailant. C. Pl. c. 56.

§. So if in the arreſt and ſtriving together, the Officer kill him, no Felony.

Now touching all the former Homicides, these *things observable:*

1. There must be no Malice coloured under pretence of necessity; for if it be, it alters the Case, and makes it Murther.

2. The Party that did the Fact must be arraigned, and upon *Not Guilty* pleaded, the Special Matter must be found.

3. Upon this Special Matter thus found, the party is to be dismist without any forfeiture or pardon purchased.

2. Thus

2. THus of Homicide *ex neceſſitate*, in reference to Publick Juſtice: Others there are that are grounded upon *Private Intereſt*, and they of two kinds:

1. *Juſtifiable*, and conſequently inducing no forfeiture at all, nor needing pardon.

2. *Excuſable*, and yet inducing a forfeiture.

1. *Juſtifiable*, and inducing no forfeiture, where a Perſon comes to commit a known Felony.

1. If a man come to burn my Houſe, and I ſhoot out of my Houſe, or iſſue out of my Houſe and kill him, no Felony. Dalt. c. 98.

2. If a Woman kill him that aſſaulteth to Raviſh her, no Felony.

3. If Thieves aſſault me in the High-way, or in my Houſe to rob me, and I, or my Servant kill them, no Felony nor forfeiture. 24 H. 8. c. 5.

But if the Assault in my House were not to rob me, but to beat me, &c. there would be only *se defendendo*, and Goods forfeited, and a Pardon of course to be granted, because (they) came not to commit a known Felony; for it cannot be judged whether he meant to kill me.

Dalt. c. 93. If one come to enter into my House, claiming Title, and I kill him, Manslaughter.

Crom. 24. If *A.* enter wrongfully into the House of *B.* riotously and forceably, *B.* and others endeavour to fire the House, *A.* kills, Manslaughter.

Se

Se defendendo.

HOmicide *Excuſable Se defendendo*, which though it ſave the Life, yet the Goods are forfeited; this requires theſe things:

1. It muſt be an inevitable neceſſity. C.PC. f. 56.

In caſe of a juſtifiable Homicide, as of a Thief that comes to rob me, or by an Officer reſiſted in Executing an Arreſt, the Party need not give back to the Wall.

But in this Homicide *Se defendendo*, the Party that is aſſaulted not excuſed, unleſs he give back to the Wall. C.PC. 57.

But if the Aſſault be ſo fierce, and in ſuch a place that giving back would endanger his Life, then he need not give back. C. PC. 57.

A man fights, and falls to the ground, then flying not neceſſary. Dalt c. 98.

2. It muſt be in his defence.

If *A.* be aſſaulted by *B.* and before a mortal Wound given, *A* gives back till he come to the Wall, and C.PC. 56.

then

then in his defence kill *B.* this is *Se defendendo.*

But if the Mortal wound firſt given, then Manſlaughter.

Dalt. c.98. Crom. 26. If *A.* upon Malice *præpenſe* ſtrike *B.* and then fly to the Wall, and there in his own defence kills *B.* this is Murther.

But if there be Malice between *A.* and *B.* and *A.* ſtrike firſt, *B.* retreats to the Wall, and in his own defence kills *A.* this is *Se defendendo.*

Cro. fo. 25. If Malice be betwixt *A.* and *B.* and *A.* aſſaults *B.* *B.* retreats to the Wall, and then kills *A.* in his own defence; if it be in the High way he ſhall be diſcharged, but if not, yet it is *Se defendendo. Copſton's* Caſe.

Murther.

Murther.

THus far of Homicide Involuntary.

Homicide *Voluntary* is either:

Ex malitia præcogitata, which is Murther.

Sine malitia, Manſlaughter.

Murther is, when a perſon killeth another of malice within any County in *England*, ſo he dye within a year and a day.

1. Who ſhall be ſaid a *perſon killing?*

A Man that is *Non compos* kills another, this is no Felony. Dalt.

§. The ſame for a Lunatick, during his Lunacy.

But he that incites a *Mad-man* to kill another, is a principal Murtherer.

A man *drunk* killeth another, this is Felony.

An *Infant* within age of diſcretion kills a man, no Felony; as if he be 9 or 10 years old.

But if by circumſtances it appeareth

eth he could diſtinguiſh between
Crom. 27. Good and Evil, it is Felony: As if he hide the dead, make excuſes, &c.

St.PC.c.9. But in ſuch caſes, Execution in prudence reſpited to obtain a Pardon.

2. What ſaid *Malice?*

It is either implied or expreſſed.

Implied Malice is collected either from the manner of doing, or from the perſon ſlain, or from the perſon killing.

1. Malice implied *in the manner* of doing.

C.PC.52. Poyſoning wilfully any man, implies malice.

Dalt.c.93. If a man do an act that apparently muſt introduce harm, and death enſue; as to run among a multitude with a Horſe uſed to ſtrike.

But Note, That if it were with an intention to do harm, then Murther; if without ſuch intention, Manſlaughter.

The like of throwing a Stone over a Houſe among many People, the intention of doing harm makes

it

it Murther; want of ſuch intention, Manſlaughter, becauſe the act unlawful.

For an intention of evil, though not againſt a particular perſon, makes a malice.

Killing any perſon without provocation, Murther.

A. comes to rob *B.* *B.* reſiſts and ſtrikes, *A.* kills him, Murther.

A. Diſtorts his mouth and laughs at *B.* who thereupon kills him, Murther. *M.* 42, 43 *El.* *Brame's* caſe.

2. Malice implied *in reſpect of the perſon killed.*

If a Watchman or Conſtable, or any that comes in his aſſiſtance, doing their Office, be killed, it is Murther, though the Killer knew him not to be ſuch. 4 *R. Hamd.* caſe, *Young's* caſe.

If any Magiſtrate or Miniſter of Juſtice, having a lawful Warrant, be killed, doing his Office, it is Murther: As where a Serjeant comes to Arreſt,

1. Though in the Night.
2. Though on Sunday.
3. Though upon the Arreſt he

he ſhew not out of what Court, or whoſe Suit.

9 Rep. *Mackally's* Caſe.

4. Though the Proces Erroneous.

5. Though he ſhew not his Warrant or Mace, where it is not demanded.

But if the Officer do what is not warrantable, as break open a Window to Arreſt, there though ſlain, Manſlaughter only. *Paſch.* 15 *Car. Cook's* Caſe.

Malefactors come into a Park, the Parker ſhoots, they fly, he purſues, they kill him, Murther in all; for their firſt entry was with a Malicious intent. *Mich.* 17 *Jac. Uſran's* Caſe.

3. Malice implied *in reſpect of the perſon killing.*

A. aſſaults *B.* to rob him, *B.* reſiſts, *A.* kills him, Murther.

Priſoner by Dureſs of the Gaoler comes to an untimely end, Murther.

Executing Martial Law in time of Peace, Murther.

2. Malice

2. Malice *Expreſs* conſiderable,
   1. In the Principal in the firſt degree, that doth the act.
   2. In the Principal in the ſecond degree, that is preſent and aiding, or abetting.
   3. In the Acceſſory before the Fact.

I. In the Principal *in the firſt degree.*

1. If a perſon have no particular Malice againſt any Special perſon, but comes with a general reſolution againſt all Oppoſers, if the act be unlawful, and death enſue, it is Murther: As if it be to commit a Riot, to enter into a Park; Lord *Dacre*'s Caſe. Crom. 20.

2. If there be Malice between *A.* and *B.* and they meet and fight upon that Malice, though *A.* gives firſt blow, yet if *B.* kill him, it is Murther. Crom. 21.

If there be Malice between *A.* and *B.* and *A.* aſſault *B.* and after *A.* flies to the Wall, and there in his own defence kill *B.* by ſome this is Murther; but *Quære.*

If

If there be quarrel between *A.* and *B.* and *A.* challenge *B.* *B.* declines it; but at length upon Importunity, and to vindicate his Reputation, meets and fights, and kills *A.* this is Murther, *Pasch.* 14 *Jac. Taverner's* Case.

If *A.* and *B.* fall out upon a sudden, and they presently agree to fight, and each fetch a Weapon and go into the Field, and one kills the other; this is only Manslaughter, because the Blood never cooled: but otherwise if they appoint to fight the next day.

C.PC. 55, 57.

A. and *B.* fall out, *A.* saith he will not strike, but will give *B.* a pot of Ale to touch him, *B.* strikes, *A.* kills him, Murther.

Laurence case. 38 *El.*

If *A.* and *B.* are in Malice, and *A.* challenge the Field, and *B.* refuse to meet, but he saith he shall go to morrow to such a Town, *A.* meets him, assaults him, and *B.* kills him, Manslaughter, and no Murther.

The Child of *A.* beats the Child of *B.* who runs home to his Father, and he runs three quarters of a mile, beats

Hill. 9 *Jac. Rawly's* case.

beats the other Child, and he dies; Manſlaughter.

3. If Malice be not continuing till the death, no Murther.

A. and *B.* combat upon Malice, and are parted, and after they meet and combat upon the ſudden, and one kills the other; by ſome not Murther, becauſe the firſt Malice ſatisfied. Crom. 21.

If the party killed had wounded at the firſt combat the party ſlaying, *Quære.*

A. and *B.* are at Malice, and reconciled, and after upon a new Occaſion fall out and kill, no Murther.

4. Though the Malice did *not riſe ſo high* as death, but intended only to beat the party; yet if malicious, it is Murther if death enſue.

A Keeper of *Eſterly* Park finds a Boy ſtealing Wood, bound him to his Horſe-tail and beat him, the Horſe ran away, kill'd the Child, Murther; for it was a deliberate act, *Mich.* 4 *Car. B. R. Holloway*'s Caſe.

5. The malice intended to one, *egreditur perſonam*, and makes the death of another upon that malice, Murther, and qualifies the act in the ſame manner, as if it had had its due effect.

Dy. 128. *A.* having malice at *B.* ſtrikes at him, and miſſeth, and kills *C.* this is Murther in *A.* and if it had been without malice *præpenſe*, Manſlaughter.

Crom. 101. *Elly's* caſe. *A.* having malice to *B.* aſſaults him, and kills the Servant of *B.* this is Murther in *A.*

9 Rep. *Gore's* caſe. *A.* lays poiſon to kill *B.* and *C.* at miſadventure takes it, and dies; Murther in *A.* Contrary, if it had been laid to kill *Rats*; then *infortunium.*

A. and *B.* combat upon malice, *C.* comes to part them, *A.* kills *C.* this is Murther, and *per aſcuns*, Murther in both; and if the falling out were ſudden, then only Manſlaughter in him that kill'd him. *Vide Dyer* 128. 20 *E.* 3. *Corone* 262.

6. The malice muſt be of Corporal damage to the party.

2. Prin-

II. Principals *in ſecond degree*, that are aiding and abetting.

1. If two or more come together to kill, rob, or beat a man, or to commit a Riot, and one of them kills a man, this is Murther in all them of that party that are preſent, aiding or abetting him thereunto, or that were ready to aid him, though but lookers on: Otherwiſe, if he came there by chance. St. P. C. c. 40.

2. All are ſaid to be preſent that are in the ſame Houſe, though in another Room, or in the ſame Park, though half a mile diſtant, and out of view; therefore if they came to commit a Felony, ſuch perſons aiding or abetting ſhall be ſaid preſent. 34 H. 8. B. Coron. 172. M. 17 Jac. *Warnial's* caſe. Crom. 19. Dalt c. 93.

3. *A.* and *B.* fall out, and appoint the Field; *A.* takes *C.* his Second, *B.* takes *D.* his Second; *A.* kills *B.* this is doubtleſs Murther in *C.* and it hath been held Murther in *D.* alſo, for it is a Compact: But it ſeems otherwiſe. Dalt c. 93. Dy. 128.

4. If *A.* and *B* having malice *præpenſe*, meet and fight, and *C.* the

Crom. 100.

Servant of *A.* not acquainted therewith, take part with *A.* his Maſter, and kill *B* this is Murther in *A.* but only Manſlaughter in *C.*

The ſame Law if *C.* came in ſuddenly, and took part with *A.* and kill'd *B.* *Vide* Sir *Ferdinando Cary's* Caſe, 14 *Jac.*

Mes ſi un vient la per chance, & n'abette, n'eſt principal, nec acceſſory al Manſlaughter ou Murther, Stamf. 49.

3. What Malice in the *Acceſſory* before the Fact.

A. commands *B.* to kill *C.* with a Gun, he kills him with a Sword, *A.* is acceſſory to this Murther, becauſe the killing was the ſubſtance.

But if he command *B.* to kill *C.* and he by miſtake kill *D.* this is Murther in *B.* but *A* is not acceſſory thereunto.

A. commands *B.* to beat *C.* who beats him, whereof he dies, this is Murther in *B.* and *A.* is acceſſory, becauſe death enſues upon the act commanded.

4. What

4. What *Killing?*

Ptiſon, Weapon, Gun, Bow, Cruſhing, Bruiſing, Smothering, Strangling, Famiſhing, inciting Dogs.

§. Laying a Sick man in the cold.

Laying an Infant in an Orchard under Leaves, and he ſtricken with a *Kite.*

A man keeps a Beaſt uſed to ſtrike knowingly, and ties it not up, the Beaſt kills a Man, Felony by ſome, by others not, but a great Miſdemeanour, 3 *E.* 3. *Cor.* 311. St Dal. c. 93.

5. What the *perſon killed?*

It muſt be a perſon *in rerum natura.*

If a Woman quick with Child take a Potion to kill it, and accordingly it is deſtroyed without being born alive, a great Miſpriſion, but no Felony; but if born alive, and after dies of that Potion, it is Murther.

The like, if it dies of a ſtroke given by another in like manner.

§. Counſel before the birth to deſtroy it, and after the Child is C. P. C. c. 7. Dal. c. 93. contra.

Ibid. born deſtroyed accordingly, the Counſellor is Acceſſory.

6. What a place *within the Realm?*

C.P.C.c.7. Stroke and death *in partibus tranſmarinis* not puniſhable at Common Law, but before the Conſtable and Marſhal.

Stroke and death upon the Sea inquirable before the Admiral, or according to the *Stat.* of 28 *H.* 8. *c.*13. But Stroke upon the Sea, and death within the Body of the County, not puniſhable at all.

If the Stroke in one County, and the death in another, the party ſhall be indicted where the death happened.

An Acceſſory in the County of *A.* to a Felony committed in the County of *B.* the Acceſſory after Certificate of the Conviction and Attainder of the Principal, may be Arraigned upon an Indictment in the County of *A.* where he was Acceſſory. *Stat.*2 *E.*6. *c.*24. *Vid. Fortman Proceſſus inde in B. R. C.P.C. cap*7. *Overbury's* Caſe.

7. The

7. The party must die *within the Tear and the Day* of that Stroke, or Poison,&c.

Manſlaughter.

KILLING another upon a ſudden falling out, or provocation, or unjuſtifiable act, Manſlaughter.

1. What a *ſudden falling out?*

C. PC. c. 8. Two combat and part, and preſently come together and fight, or one preſently fetcheth a Weapon and killeth the other, or they preſently fetch their Weapons, and go into the field, and one kills the other, Manſlaughter.

Divers Rioters enter into anothers Houſe forcibly, and eject the People; afterwards they being in poſſeſſion, the party ejected, with twenty more, come in the Night to the Houſe, endeavour to fire it, and one within ſhoots and kills one of the aſſailants; ruled to be Manſlaughter, becauſe their entry and holding with force illegal; and not Murther, becauſe a ſudden provocation.

So

So *A.* claims Title to the houſe of *B.* *A.* attempts to enter and ſhoots at the houſe; *B.* ſhoots out and kills *A.* adjudged Manſlaughter.

Two fall out and fight, and one breaks his Sword; a Stranger ſtanding by ſends him another, and he kills therewith, Manſlaughter in both. Dalt. c. 94.

2. What a *ſudden provocation?*

Two ſtrive for the Wall, and one kills the other, Manſlaughter.

3. What *unlawful act*, whereupon Death enſuing will make Manſlaughter?

If the unlawful act be deliberate, and tend to the perſonal hurt of any immediately, or by way of neceſſary conſequence, death enſuing, is Murther.

But if either ſuch deliberation or intent of perſonal hurt be wanting, Manſlaughter.

Two play at Foils, and one kills the other, Manſlaughter. Sir *John Chicheſter*'s Caſe, 11 *H.* 7. 23. *Vide Kell.* 108, 136. *Wraſling, & un tue autre.*

A man throws a Stone at another, which glanceth and killeth another, Manſlaughter; and not Murther, becauſe no malicious intent to hurt; not *per infortunium*, becauſe doing an unlawful act.

There is a particular Manſlaughter, wherein Clergy is ouſt, by the *Stat.* 1 *Jac.c.*8. wherein,

1. He that is ouſted of Clergy by that *Statute*, muſt be eſpecially indicted purſuant to the *Statute.*

2. It extends to him that actually gave the Stroke, not to thoſe that are preſent.

3. Need not conclude *contra formam Statuti.*

4. Although the Indictment be Special upon the *Statute*, yet the Jury may find general Manſlaughter. *Hill.* 23 *Car. B.R. Page*'s Caſe.

A. Newgat. rep. 16 *Car.* 2. A man whips his Horſe in the Street to make him run ſpeedily, and the Horſe runs over a Child, and kills him; Manſlaughter: But another whips the Horſe, whereby he ſprings out, and runs over a Child, and kills him;

per

per infortunium. Nota, Indictment de Murther per ceo que eſt per infortun' ſur non culp' pled' Jury poet trover luy non culp' ſi ſoit Coroners Inqueſt, que trove ceo per misfortune & le party conuſt ceo. Prettye's *Caſe.*

Larceny.

Larceny.

WE come to Offences Capital, which refer to *the Goods* of any Perſon, *viz. Larceny*, which is of two kinds:

{ Simple Larceny,
{ Mixt and complexed Larceny.

Simple Larceny of two kinds:
Grand Larceny, of the value of 12 pence.
Petit Larceny, under that value.

Simple Larceny, a felonious and fraudulent taking away by any perſon of the meer perſonal Goods of another, not from the perſon, nor out of his houſe, to the value of 12 pence.

I. What

I. What ſhall be ſaid a *Felonious taking?* Imports two things:

1. A Taking neceſſary; the Indictment muſt be *Cepit*; if it be *felonice Abduxit Equum*, not ſufficient.

If a perſon find Goods loſt, and convert them, though the Converſion were *animo furandi*; yet no Felony. C.PC.

If a man hath a *bare charge* of Goods, Felony may be by him committed: As a Butler that hath charge of Plate, Shepherd of Sheep; the like of him that hath a *bare ſpecial uſe*, as the Gueſt that hath Plate ſet before him.

But he that hath a *poſſeſſion by delivery*, cannot thereof commit Felony.

A Carrier hath Goods delivered to him, and he carries them away, no Felony.

A. lendeth his Horſe to a Stranger, who rides away, no Felony.

A Clothier delivers Yarn to a Weaver

Weaver to weave, he carries it away, or imbezels it, no Felony.

But this hath two Exceptions:

1. If the Privity be determined, then it may be Felony.

A. delivers a Pack or a Tun of Wine to a Carrier, he opens it, and take out Goods or Wine, *animo furandi*, Felony.

So if *A.* deliver Goods to *B.* to carry to a certain place, he carries it to the place appointed, and after takes it *animo furandi*, Felony.

2. By *Stat.* 21 *H.* 8. *c.* 7. whereby if a Servant goes away with the Goods of his Master, delivered to him above the value of 40 shillings; herein,

1. Extends not to Apprentice, nor Servants within eighteen years.
2. Requires a Delivery.

C.P.C. c. 44. Dalt. c. 102.

If one Servant deliver the Goods to the other, this is delivery by Master.

If

If the Maſter deliver an Obligation, or deliver Cattel to ſell, and the Servant receive the money and depart with it, it is no Felony: The like if he had gone away with the Obligation.

3. He muſt go away with it.

Waſtfully conſuming, &c. thereof, no Felony.

4. Now by the *Stat.* of 1 *E.* 6. *c.* 12. he may have his Clergy.

5. He muſt be a Servant at the time of the delivery, and going away; therefore for imbezelling after Maſter's death, *Stat.* 33 *H.* 6 *c.* 1. gives remedy.

6. If a Servant receive his Maſter's Rents, and go away with them, not within the *Statute.*

If a man, ſeeing a Horſe in the Paſture of the Owner, having a mind to ſteal him, obtains a Replevin, and thereby hath the Horſe delivered, this is a Felonious taking. C.PC. 67.

If

Crom. 34. If *A.* feloniouſly take my Horſe, and *B.* feloniouſly takes him from him, *B.* may be appealed or indicted as of a felonious taking from me.

§. *Stat.* 33 *H.* 8. *c.* 1. Falſe token.

Un priſt feme de I. S. *ove ſes biens countre le volunt, eſt Felony: Contra ſi feme priſt les biens le baron & ala ove eſtr' de ſa bone volunt.* 13 Aſſ. 6. *Iſſint ſi feme covert priſt biens le baron, ou eux dona al eſtr' que eux import, neſt Felony.* Abridg. Aſſ. 63.

II. What a *Carrying away?*

C. P. C. c. 47. A Gueſt takes Sheets out of the Bed, brings them into the Hall with an intent to carry them away, but is apprehended before this; a Carrying away.

A. takes the Horſe of *B.* with an intent to ſteal him, but is apprehended before he can get out of the Paſture; this Taking away.

Crom. 33. *A.* kills my Sheep, ſtrips them, carries away their Skins, Felony; ſo if he pull off their Wool.

III. *By*

III. *By whom?* and who ſuch a perſon, as may commit Larceny.

An *Infant* under Fourteen years may commit Larceny; but prudence to reſpit Judgment; yet one under Fourteen burnt in the Hand. *Preſidents.* Dalt. 104.

A *Femè covert* by her own act may commit Larceny, and in ſuch caſe the Husband may be Acceſſory to the Wife in receiving her; but not *è converſo.*

But ſhe cannot felonioufly take her Husband's Goods; and though ſhe ſo take her Husband's Goods, and deliver them to a Stranger, yet no Felony in the Stranger.

If Husband and Wife do both a Felony, this is Felony in both, and both arraigned for it. Dalt. 104.

Nota, Books old and latter, and Practiſe, *contra.*

If the Wife commits Murther by coercion of her Husband, Murther in both; but if theft, no Felony in

her; but a bare Command excuſeth her not.

But if a *Servant* commit Theft by coercion of his Maſter, yet it is Felony.

IV. What meer *perſonal Goods?*

Dalt.c.47. 1. If they are in the Realty, or annexed thereunto, no Larceny: As Corn or Graſs growing, Apples on Trees.

§. Stealing a Cheſt of Charters, no Felony, though the Cheſt above value.

Taking Lead off a Church no Felony: Otherwiſe if he leave it a while, and after come and take it.

Taking an Infant Ward, no Felony.

2. If they are of a baſe Nature, as Maſtiffs, Dogs, Bears, Foxes, Monkeys, Ferrets, or their Whelps, there can be no Felony of them; but of Hawks reclaimed Felony may be.

V. What

V. What ſaid the *Goods of another.*

1. He that hath a Special property, as a Bailiff, &c. they are his goods *pro tempore*. *A.* bails Goods to *B.* and after to the intent to charge *B.* ſteals them from him, Felony in *A.* 21 *H.* 7. *Kel.* 70. *Cloth in maines Toylor.*

2. He that takes the Goods of a Chapel in time of Vacation, indictable *quare bona Capellæ*; ſo *bona Parochianorum*, *bona mortui*, or *bona ignoti*, *&c.* Dal. 103.

So to ſteal the Shroud of a Perſon buried; and it ſhall be *bona Executorum. Vid. Tamen contra*; 15 *Jac. Nottingham's* Caſe. C.P.C. 47.

But taking of Treaſure trove, Wrecks, Waiſs and Strays before ſeiſure, no Felony.

Taking an Obligation Felony, becauſe in action.

Taking Fiſh in a River no Felony; but Fiſh in a Net, Trunk, or Pond, Felony, becauſe not at their natural

liberty: So of old Pigeons out of the Houſe.

Where a man hath a Property only *ratione loci*, or *privilegii*, in things *feræ naturæ*, as Coneys or Deer in my Ground, Park or Warren, no Felony.

Mes ſil ne conuſſant d'eſtre tame, n'eſt Felony. V. Mag. Chart. 201.

But if reduced to tameneſs, and fit for food, as Deers, Coneys, Cranes, Partridge, Pheaſants, he that ſtealeth them, knowing them tame, committeth Felony.

So of Swans marked and pinioned, or Swans unmarked if tame, kept in a Mote, Pond, or private River.

Where a man hath a Property *ratione impotentiæ* in things wild by Nature, as young Hawks in the Neſt, young Pigeons in the Neſt, Felony thereof.

Taking of Eggs of Hawk or Swan out of the Ground of another, no Felony, but puniſhable by *Statute*.

But taking any thing *domitæ naturæ*, as Duck, Hen, Geeſe, Turkeys, Peacoks, or their Eggs; or Domeſtick

meſtick Beaſts, as Horſes, Mares, Colts,&c. or their young, Felony.

VI. Where this ſhall be ſaid a *Felonious taking.*

If *A.* ſteal Goods in the County of *B.* and carry them into the County of *C.* he may be appealed or indicted in the County of *C.* for Larceny, but can be indicted of Robbery only in the County of *B.* Only in the former Caſe the *Stat.* of 25 *H.*8. *c.*1. ouſts them of their Clergy, if they were not to have had Clergy if arraigned in the County of *B.* where the Robbery committed. Crom. 34. V. + H. 7. 5.

Si Gueſt priſt Sheets hors de lect felonioufly, & eux import in hale, & la ſur fear de purſuit relinquiſh eux, Felony. 27 Aſſ. 39.

VII. Of the *value* of Twelve pence, or above.

1. *Nota*, That in caſe of Grand Larceny it muſt be above the value of Weſtm. 1. c. 15. 21 Jac. c. 6.

of Twelve pence; and if it be but of the value of Twelve pence, or under, it is Petit Larceny.

2. If two ſteal Goods to the value of Thirteen pence, this is Grand Larceny in both.

Dal. c. 101. Crom. 36. 5 E. PC. c. 24.

3. If one perſon at ſeveral times, at one time ſteal Four pence, at another Six pence, at another Three pence, in all amounting to above Twelve pence, from the ſame perſon, all theſe put together in one Indictment, amount to Grand Larceny; and Judgment of Death.

4. If a man be Indicted of ſtealing Goods to the value of Ten ſhillings, and the Jurors find Specially, as they may, the value but Ten pence, 'tis but Petit Larceny, and no Judgment of Death.

And Note, Petit Larceny is Felony, though not of Death; and for this he ſhall forfeit Goods, and be ſubject to Whipping, or other Corporal puniſhment. *Iſſint ſi fugam fecit furt biens.* Coron. 106.

Robbery

Robbery.

COmplicated or mixt Larceny, which hath a farther degree of guilt in it.

1. For that it is a Taking from the Perſon.

2. For that it is a Taking out of the Houſe.

1. Taking *from the Perſon.*

1. Where the Perſon is put in fear, and then 'tis Robbery.

2. When not put in fear, and then 'tis Larceny from the Perſon.

Robbery is a felonious and violent taking away from the perſon of another Mony or Goods to any value, putting him in fear.

1. *Violent and putting* him *in fear*; the words of the Indictment run, *violenter & felonice*, and that diſtinguiſhes him from a Cut-purſe.

2. *Taking away.*

1. An aſſault to rob without any taken, is no Felony.

If a Thief, with or without Weapon drawn, bid the party deliver his Purſe, and he doth it, this is a taking to make it Robbery.

Crom. 31. If a Thief command to deliver his Purſe, and he deliver, and the Thief finding little in it, deliver it back, this is Robbery.

C. PC. c. 16. If a Thief compel the True man by fear to ſwear, to fetch him a Sum of Mony, which he doth accordingly, and the Thief receives it, it is Robbery.

If the True man's Purſe be faſtned to his Girdle, the Thief cuts the Girdle, the Purſe falls to the Ground, no Robbery; but if the Thief take up the Purſe, though he let it fall again, Robbery, though he never take it up more.

All that come in Company to rob, Principals, though one only actually do it.

Crom. 34. *A. B.* and *C.* aſſault *D.* to rob him in the High way, but rob him not, for that he eſcaped: *A.* rides from the reſt, in the ſame High way, and robs *E.* out of view of the reſt, and came

came back to the reſt, and for this *B.* and *C.* arraigned and hanged, though aſſented not, becauſe they all came to the end to rob. *Pudſey's* Caſe.

3. Taking *from the Perſon.*

If the True man, ſeeking to eſcape, caſts his Purſe into a Buſh, or let fall his Hat, if the Thief take it, Robbery.

Taking a thing in my preſence, is in Law a taking from the Perſon.

If one take or drive my Cattel out of my Paſture in my preſence, this is Robbery, if he make an aſſault upon me, or put me in fear. Dalt. c. 101.

But if he take any thing from my Perſon, without putting me in fear by aſſault or violence, no Robbery; and the Indictment runs, That he took it from the Perſon violently and feloniouſly, putting him in fear. Dalt. ibid. Dyer 224. Dalt. ibid.

4. Of what *value* ſoever.

Though under Twelve pence. C.P.C. c. 16.

Mes in forein County in tiel caſe Petit Larceny, car n'eſt Robbery la. 2 Jac. *More's* Rep.

Now though Robbery and ſim-

ple

ple Larceny are both Capital, yet they differ in theſe Reſpects:

1. The Principal and Acceſſory before are ouſted of Clergy, but not in Simple Larceny.

§. *Stat.* 23 *H.* 8. *c.* 1. 1 *E.* 6. 12. 25 *H.* 8. 3. 4 & 5 *Phil.* & *Ma. c.* 4. *Nota*, ſpeaks of Robbery in or near the High-way.

2. In the form of the Indictment:

An Indictment of Robbery ſuppoſeth an Aſſault, beating and wounding, and taking from the perſon *felonice*; or at leaſt aſſault and putting in fear, *felonice & violenter cepit à perſona:* Other Indictments, though of a taking from the perſon, yet not *violenter.*

3. In caſe of other Theſts, though from the perſon, not Felony of Death, unleſs it exceed Twelve pence: But here it is Felony of Death if never ſo ſmall.

Larceny from the Perſon.

LArceny from the Perſon *without putting in Fear*; which may be either by picking the Pocket, or cutting the Purſe, which is ſuppoſed to be done *clam & ſecrete à perſona.*

In this Caſe by the *Stat.* of 8 *El. c.* 4. If the Indictment purſue the *Statute*, which is ſecretly without the knowledge of the party, *clam & ſecrete*, he is ouſted of his Clergy.

But if it be under value of Twelve pence, then it remains Petit Larceny, as before; for the *Statute* did not alter the Offence, though it took a Privilege. C. PC. c. 86. Crom. 103.

Larceny from the Perſon, which is neither *clam & ſecrete à perſona*, nor with putting in Terror, nor ſo laid in the Indictment, nor ſo found by the Jury, Clergy. *Dyer* 224. 17 *Jac. Harman's* Caſe.

Larceny from the Houſe.

LArceny receives another aggravation, when it is taken *from the Habitation* of a man.

Per Stat. 23 H. 8. c. 1. Robbing any perſon in their dwelling-houſe, the Owner, his Wife, or Children, or Servants being within, and put in fear, ouſted of Clergy in caſe of Conviction, together with Acceſſories before, by *Stat.* 23 *H.* 8. *c.* 1.

Felonious taking of Goods to the value of Five ſhillings out of any Dwelling-houſe or Out-houſe, tho' no perſon within, ouſt of Clergy by 39 *El. c.* 15.

Theſe have a Mark upon them as Larcenies complicated, and ſo ouſt of Clergy. *Vide infra Clergy.*

Piracy.

TO this we may add Piracy and Depredation upon the Sea.

This at Common Law convicted, C.PC. c.49. Petit Treaſon, if done by a Subject.

But this alter'd by *Stat.* 25 *Ed.* 3.

Since that *Statute* an Offence triable by the Civil Law till 28 *H.* 8. 15.

The *Stat.* 28 *H.* 8. alters not the Offence; but it remains only an Offence by the Civil Law: and therefore a pardon of Felonies doth not diſcharge it: but it gives a Trial by the courſe of Common Law:

1. It extends not to the Acceſſories: But if the Acceſſory were at Sea, triable by the Civil Law; if at Land, by no Law: For *Stat.* 2 & 3 *E.* 6. extends not to it.

2. It extends not to Offences in Creeks or Ports within the Body of a County, becauſe puniſhable by the Common Law.

3. Though

3. Though it give forfeiture of Life, Lands and Goods, yet no Corruption of Blood.

4. *Paine fort & dure*, in caſe of ſtanding Mute.

Burglary.

Burglary.

3. WE come to the Offences *againſt the dwelling or habitation*; and that of two *kinds*:

1. Burglary.
2. Arſon, or Burning.

Burglary by the Common Law is, where a perſon in the Night-time breaketh and entreth into the Manſion-Houſe of another, to the intent to commit ſome Felony within the ſame, whether the Felonious intent be executed or not.

I. What ſhall be ſaid in the *Night?*

By ſome, after Sun-ſet and before Sun-riſign it is Night. *Dalt.c.*99.

But it ſeems, that ſo long as the Countenance of a perſon may be diſcerned, it is Day. *Coron.*293. C. PC. c.14.

II. What

II. What *Breaking and Entring?*

The Entring into a Houſe by the Doors open, is a Breaking in Law; but here not ſufficient without an actual breaking: Therefore if the Door be open, or Window be open, and the Thief draw out Goods thereby, no Burglary.

But if the Thief break the Window, draw the Latch, unlock the Door, break a Hole in the Wall; theſe are Breaking.

And as there muſt be a Breaking, ſo there muſt be an Entry:

Setting the Foot over the Threſhold:

§. Putting the Hand, or a Hook, or a Piſtol within the Window, or Door:

Turning the Key where the Door is locked on the inſide:

§. An Entry.

In ſome caſes Burglary without actual Breaking.

Divers

Divers come to commit Burglary, and one does it, the reſt watch at the Lanes end, Burglary in all.

A Thief goes down a Chimney to rob, Burglary. Crom. 30.

Thieves having an intent to rob, raiſe Hue and Cry, and bring the Conſtable, to whom the Owner opens the Door, and when they come in, they bind the Conſtable and rob the Owner, Burglary. C.P.C. 14.

A Thief aſſaults the Houſe, the Owner for fear throws out his Mony, it ſeems not Burglary, but only Robbery.

A Thief gets in by the Doors open in the day, lies there till night, then robs and goes away, no Burglary: But if he break open the door to go out, Burglary. Dalt. 99.

The Servant opens the Window to let in a Thief, who comes in and ſteals; Burglary in the Stranger, but Robbery in the Servant. Dalt. *ubi ſupra.*

If *A.* enter into the Hall by the Doors open, the Owner retires to a Chamber, and there *A.* breaks in, this is a Breaking and Entring.

If Thieves enter into an Houſe through a Hole made there before, no Burglary.

Trin. 16 Jac. *Edmond's* caſe. *A.* lies in one part of the Houſe, *B.* his Servant in another, between them a Stair-foot-door latched, the Servant in the night draws the Latch, and enters his Maſters Chamber to Murther him, Burglary.

III. What *Manſion Houſe?*

The Church a Manſion Houſe within the Law.

§. The Out-buildings, as Barns, Stables, are parcel of the Manſion Houſe, and Burglary may be committed in them.

Nota, *L'uſe ore eſt, ſi ſoit un Barne ou Stable* disjoyned at any diſtance from the Houſe, *n'eſt Burglary.*

Burglary may be committed in a Manſion houſe, though all perſons be out upon occaſion.

So if a man hath two Houſes, and ſometimes live in one, ſometimes in another.

A

A Shop parcel of a Manſion houſe.

A Chamber in an Inns of Court, where a perſon uſually lodges, a Manſion houſe.

But a Booth is not, and therefore remedy eſpecially provided *per Stat.* 5 *E.*6.*c.*9.

But an Indictment *quod fregit clauſum ad ipſum interficiendum*, no Felony, for no Manſion houſe.

A. leaſes to *B.* a Shop, parcel of his Houſe, to work in, where *B.* works in the day, which is broken, Ruled not Burglary, becauſe ſevered *per* Leaſe. *Trin.*17 *Jac.*

IV. With *Intent* to commit ſome Felony.

If the Houſe be broken and entred with an Intent to commit a Treſpaſs, as to beat the Owner, no Felony. C.P.C. c. 14.

If with intent to commit a Rape, by ſome no Burglary, becauſe no Felony at Common Law; but this ſeems otherwiſe, though the Felony be not done

The Indictment runs, *Burglariter & felonice domum, &c. fregerunt vel intraverunt ad ipſum, &c. interficiendum.*

And by the *Stat.* of 18 *El.* c. 6. Clergy taken away in all Burglary.

Arſon.

Arſon.

Burning is Felony at Common Law, by any that ſhall maliciouſly and voluntarily burn the Houſe of another.

Burning.

Setting Fire on a Houſe, without burning it, or any part of it, no Felony; but if part of the Houſe be burnt thereby, it is Felony by Common Law.

Maliciouſly.

A. intending to burn only the Houſe of *B.* thereby burns the Houſe of *C.* this is Felony; and he may be Indicted, That *ex malitia præcogit'* he burnt the Houſe of *C.*

A. maliciouſly burns his own Houſe, to the intent to burn others, but none elſe but his own burnt, ruled no Felony, but a great miſdemeanour; upon which ſet in the Pillory, and bound perpetually to Good Behaviour. 9 *Car. B. R. Haines's* Caſe.

Mes ſi le meaſon d'autre p̄ eſt combure, eſt Felony.

The *Houſe.*

In-ſet Houſe, or Out ſet Houſe.

If parcel of the Manſion Houſe, as Stable, Mill houſe, Sheep-houſe, Barn, and no Clergy.

§. But burning of a Barn, not parcel of a Manſion-Houſe, if it hath Corn or Hay in it, Felony, otherwiſe not.

But Felon not ouſt of Clergy, unleſs part of the Manſion Houſe or Barn with Corn.

Burning the Frame of an Houſe by 37 *H.* 8. attempting to burn a ſtack of Corn, by 3 & 4 *E.* 6. made Felony, but both Repealed 1 *Ma.*

But in *Northumberland*, *Cumberland*, *Weſtmerland*, and *Durham*, Felony to burn a ſtack of Corn by 43 *El.c.* 3.

Nota, The Indictment of Burglary, *Domum Manſionalem*; of Arſon only, *Domum.*

Breach.

Breach of Priſon.

NOw we come to thoſe Felonies that are the *hindrance of ameſning a Felon to publick Juſtice*; And they are of three kinds in reference to the perſon that cauſeth it:

1. In the party himſelf:
   - Breach of Priſon.
   - Eſcape.
2. In the Officer or Perſon that permits it; and then,
   - Voluntary.
   - Involuntary.
3. In a Stranger, that is Reſcue.

1. *Breach of Priſon.*

At Common Law it ſeems all breach of Priſon, Felony; but by *Stat.* 1 E. 2. *nullas de cætero, qui priſonam fregerit, ſubeat Judicium vitæ vel membrorum pro fractione priſonæ, niſi cauſa, pro qua capt' & impriſonat' fuerit, tale Judicium requirit.*

And herein these things are considerable:

1. Who may *Arrest* or Imprison?
2. What a *Prison*?
3. What *breaking* a Prison?
4. What a *Cause* that requires a Judgment to make this Felony?

Arrest.

Arreſt.

1. WHo may Arreſt or Impriſon? This is either,
   1. By a private Perſon.
   2. By a publick Officer.
   1. Arreſt *by a private Perſon*, and that two kinds:
      1. Either commanded and enjoyned by Law.
      2. Or permitted and allowed by Law. C.PC.f.53.

Arreſt *commanded* by Law.

1. Perſons preſent at the committing of a Felony muſt uſe their endeavours to apprehend the Offender, otherwiſe they are to be fined and impriſoned. St.PC.c.29.

Hence it is that if a Murther be committed in the day in a Town not incloſed, the Townſhip ſhall be amerced; if in a Walled Town, be it Night or Day, the Town ſhall be amerced [if Offender eſcape.] *Stat.* 3 *H.*7.1.

So

So it ſeems if one ſtrike another dangerouſly, though death hath not yet hapned.

C PC. 25. 2. Upon *Hue and Cry* well levied, every man may and muſt arreſt the Offender upon whom it is levied, by *Stat. Wincheſter:* And want of purſuit thereof is puniſhable by Fine and Impriſonment.

The *manner of levying Hue and Cry* is, where a Felony is committed, or a dangerous ſtroke given, reſort to the Conſtable, declare the Fact, deſcribe the party and the way he is gone, who thereupon is to raiſe the Town, be it by Night or Day, and to give the next Conſtable warning, and he the next.

3. In aid of an Officer that hath a lawful Warrant *in fact*, or in Law, to arreſt a Malefactor.

Dalt. fo. 249. And in theſe caſes it ſeems it is in the power of ſuch private perſon to break the Houſe, if upon demand he cannot be admitted to take the Offender. 7 *E.* 3. 16.

. Coke Jur. Courts 177. *Videtur*, 1. *Sur felony fait & juſt ſuſpicion aſcun poit arreſter.* 2 E. 4. 8.

2. *Sur*

.2. *Sur Arreſt dit' ameſner al Common Gaol*, 20 E. 4. 6. *ou deliver al Conſtable*, 10 E. 4. 1.

2. A *permiſſive* Arreſt by a private perſon:

If a felony in Fact be committed, and a private perſon ſuſpect another upon a probable cauſe, he may be arreſted, though in truth innocent: And theſe may be *Probable Cauſes*;

Hue and Cry levied;

§. Company with the Offender;

§. Goods in his Cuſtody;

§. Living vagrantly;

§. Common Fame.

But upon ſuch ſuſpicion he cannot break open the Door of a Houſe, but may enter the Door being open. C. *Jur. Courts* 179.

The perſon Arreſted by either of theſe means by a private perſon, muſt be brought to the Conſtable; and if Conſtable be not to be found, to a Juſtice; and in caſe of a Felony known, put in the Stocks or Common Gaol till he be brought to a Conſtable. Dalt. fo. 414.

2. Arreſt

2. Arreſt *by a publick Officer*, without Proceſs of Law.

Nota, Whatſoever a private perſon may do in this caſe, an Officer as a private perſon may do.

Now theſe *Officers*,

1. *Conſtable.*

If complaint be made to a Conſtable of Felony committed, or of a dangerous Blow given, though the party not dead; or in caſe there be an aſſault upon the Conſtable, or in caſe of any other breach of the Peace, the Conſtable may impriſon the party in the Stocks, in the Gaol, or in his Houſe, till he can bring him before a Juſtice of Peace.

But if it be a bare breach of the Peace, unleſs it be in his view, he cannot Arreſt the party; but complaint muſt be made to a Juſtice of Peace: For the Conſtable is but a Conſervator, not Juſtice of Peace, unleſs a Felony be done.

If a Conſtable ſee an Affray, and the Malefactors fly into another County before arreſt, he may purſue

ſue them and Arreſt them there, and then he muſt bring them before a Juſtice of that County where Arreſted.

But if the Eſcape was after Arreſt, then he may retake them in another County, and bring them to the firſt.

He may break open Doors to take an Offender, where Felony committed, or a dangerous Wound given. Dalt. c. 78.

2. By a Juſtice of Peace, who upon complaint may iſſue out his Warrant to apprehend the party:

1. A General Warrant to ſearch for Felons or ſtolen Goods, not good. C. Jur. Courts 177.

2. If a Juſtice hath cauſe of ſuſpicion, he may arreſt as a common Perſon, not as a Juſtice.

3. Upon complaint of a Felony committed, and where doubt may be of apprehending the Offender, in aſſiſtance of the party ſuſpecting, he may grant his Warrant to the Conſtable to apprehend the party, but the party ſuſpecting ought

ought to be preſent, becauſe it is his Arreſt.

But by virtue of ſuch Warrant Doors cannot be broken up.

4. But at the Seſſions the Juſtices may award a *Capias* againſt the Perſon indicted, and by virtue thereof the Sheriff may break open Doors.

A party being apprehended by ſuch Warrant, is either to be Committed, Bailed, or Diſcharged.

The *Commitment* by a Juſtice ought to be to the Common Gaol, by the *Stat.* 23 *H.*8. *c.*2. and the *Mittimus* ought to be,

*C. M. Car.*99. Stat.3 *H.*7. *c.*3.

1. Under Seal.
2. Contain the Cauſe.
3. Have an apt Concluſion, *viz.* there to ſtay till delivered by Law, otherwiſe the Warrant void.

C.PC.c.100. ſo.209.

And Note, That a perſon Committed for Treaſon, Felony, or other Crime, cannot be *diſcharged* till

till indicted and acquitted; or *Ignoramus* found, or discharged by Proclamation, or by the Kings Bench upon *Habeas Corpus*.

Bail.

Bail.

IN order to the conſideration of Arreſts and Eſcapes, here fit to conſider of Bail and Mainprize in caſes of Felony.

1. What Bail is?
2. In what caſes?
3. By whom?

1. *Bail*, are Sureties taken by a Perſon authorized, to appear at a day, and to anſwer and be juſtified by the Law.

The difference between Bail and Mainprize is, That Mainpernors are only Surety, but Bail is a Cuſtody; and therefore the Bail may reſeize the Priſoner if they doubt he will fly, and detain him and bring him before a Juſtice; and the Juſtice ought to commit the Priſoner in diſcharge of the Bail; or put him to find new Sureties: The like may be done by the Juſtices in caſe of inſufficient Bail.

If

If a Juſtice of Peace take inſufficient Bail, and the party appear not, the Juſtice finable by Juſtice of Gaol Delivery.

The *ſufficiency* of the Bail in reſpect of their number, two at leaſt; and thoſe Subſidy men in caſe of Felony.

And in reſpect of the ſum, Forty Pounds at leaſt.

Bail is either in a certain ſum; or *corpus pro corpore*, in which caſe the Offender not appearing, the Surety ſhall not be Executed, but only Fined. 29 *Aſſ.* 44.

2. *In what Caſes?*

1. *Generally:* To refuſe Bail where the parry ought to be bailed, the party offering the ſame is finable, as a Miſdemeanour:

§. And admitting Bail when it ought not, is puniſhable by the Juſtice of Gaol Delivery by Fine, or puniſhable as a negligent Eſcape at Common Law, *de quo infra.*

2. *Particularly:* At Common Law Bail in all Caſes but Homicide: But now the *Stat. Weſtm.* 1. *c.* 15.

directs in what Caſes bailable, and what not?

At this day, in all Offences below Felony, the party accuſed is bailable, unleſs

1. Ouſted by that *Statute*, or ſome other *Statute*.

2. Unleſs Judgment be given.

Crom. 154. If a Perſon be brought before a Juſtice, if it appears no Felony be committed, he may diſcharge him; but if a Felony be committed, though it appears not that the party accuſed is guilty, yet he cannot diſcharge him, but muſt commit or bail him.

The caſes of Felony wherein the parties are not bailable, are

1. In *reſpect of the hainouſneſs* of the Offence.

1. In a Charge of Treaſon againſt the King's Perſon:

§. Counterfeiting the Seal:

Dalt. c. 114. §. Falſifying Mony.

2. Arſon, or burning Houſes.

3. In a Charge of Homicide.

1. In caſe of a Charge of Murther Juſtices of Peace cannot bail, but the

the King's Bench may; but do not in diſcretion, for the *Stat. Weſtm.* 1. extends not to that Court. Dal. c. 114. V.C *ſuper Stat.*

2. In caſe of Manſlaughter, though it be but *Se defendendo*, and ſo appear to the Juſtices of Peace, they cannot bail the party accuſed:

1. If he confeſs the Fact upon Examination: Dal. c. 114.

2. If taken with the manner, if apparently known or manifeſted that he killed another.

But if it be a *Non liquet* that he is the Perſon, and the Charge but Manſlaughter, there it ſeems they may bail.

So if he have given a dangerous ſtroke, he may be bailed till the party dead.

But ſuch Bailment where Manſlaughter or other Felony committed, muſt be

1. By two Juſtices, one of the *Quorum*.

2. After Examination, &c.

And theſe be all the perſons excluded from Bail ſimply, in reſpect of the nature of the Offence: Hence 3 H. 7. c. 9. St. 1 & 2 Ph. & Ma. c. 13.

C.Weſt.1.c.15. 1. All Acceſſories before or after any Offence bailable; but if the Principal be attainted, and Acceſſory indicted, he ſhall not be bailed St.PC. c. 18. until he hath pleaded to the Indictment.

2. Perſons indicted of Larceny before the Sheriff, if of good Name.

3. Impriſonment for a light ſuſpicion, if of good Name.

4. Indicted or accuſed of petty Larceny only.

5. Appellee of Approver after death of Approver.

6. Accuſed for Treſpaſs, for which a man ought not to loſe life or member, if bail not taken away by a ſubſequent *Stat.*

Dalt c.114. fo 304. And hence alſo a party indicted for Burglary or Robbery may be bailed.

2. As bail is ouſted in ſome caſes, in reſpect of the greatneſs and conſequence of the Offence charged, ſo it is in *reſpect of the Notoriety* of the Offence: For bail is, when *Stat indifferenter*, whether the party be guilty or no: but when that indifferency

ferency is removed, the Offender otherwiſe bailable is become not bailable.

1. If a Perſon be Attaint by Utlary of any Felony, yet if the Defendant comes in and pleads in avoidance of the Utlary, be it in Appeal or Indictment, the King's Bench may bail him. Weſtm. 1. c. 15

2. If he be convict by Verdict or Confeſſion of any Felony, he is not bailable. Dalt. c. 114.

But if a man be convict of Manſlaughter *Se defendendo*, the Juſtices of *B.R.* or Gaol Delivery, or Special Writ may bail him, but not Juſtices of Peace: So if he have Charter of Pardon. Dalt. 383.

3. He that becomes an Approver cannot be bailed.

4. He that Abjures cannot be bailed.

5. He that's taken with the manner not bailable: And conſequently neither he that's taken freſhly upon Hue and Cry. *Bridge*'s Caſe. Juſtice of Peace fined 40 *l.* for bailing ſuch

6. He that breaks Priſon, not bailable.

7. Open and notorious Thieves, not bailable.

But he that is taken for a light Suſpicion bailable.

But if the Preſumption be ſtrong, or the Defamation great, the Juſtices may refuſe to bail him: This lies in diſcretion.

8. Thoſe that are Appealed by Provers; unleſs,

1. The Prover die.
2. The Prover waive his Appeal.
3. Unleſs he be of good Name.

And the Reaſon hereof, becauſe when the Approver appeals another, he confeſſeth himſelf guilty, and therefore induceth a preſumption of guilt in another.

But this concerns not Juſtices of Peace, becauſe no man can become Approver before them, becauſe they cannot aſſign a Coroner; but they may take the Confeſſion by way of Evidence.

But

But a bare Indictment or Appeal did not induce ſuch a preſumption that may hinder the bailing of a Perſon otherwiſe bailable. V. *Stat. Weſtm.* 1. *c.* 25.

But in Appeals of Death the Court in diſcretion admit not the Defendant to bail, but upon weighty cauſe. S.PC.18.

If the party be acquitted within the year upon Indictment, he is not to be diſcharged, but remanded or bailed at diſcretion, that an Appeal may be proſecuted againſt him. 3 *H.* 7. *c.* 1.

3. *Who may take* bail, or bail Offenders?

Bail was taken either *virtute brevis*, or *ex officio.*

1. Bail taken *virtute brevis*, that was either General or Special.

The General Writs.

Homine replegiando.

Habeas Corpus in the King's Bench.

Writ of Mainpriſe; this was directed to the Sheriff, commanding him to deliver by the Mainpriſe of

Twelve, the party indicted before him.

St.PC.77. But now by *Stat.* 28 *E.* 3. *c.* 9. theſe Inqueſts before Sheriff are taken away, and conſequently the Writ of Mainprize.

Special Writ, as where a party is convict of Manſlaughter *Se defendendo*; a Special Writ to certifie the—

2. Bail *ex officio.*

1. The *King's Bench*, who have a higher Power than any other Power.

1. They may either in caſe of an Original Suit, by Indictment or Appeal before them; or upon an Indictment or Commitment returned to them, by *Habeas Corpus* or *Certiorari*, bail where another Court cannot:

In caſe of Murther. *B.* Mainpriſe, 60,63, *&c.*

In the caſes prohibited by *Stat. Weſtm.* 1. *c.* 15. V. *Cook ibid. verb. Viſcounts*, *& autres verb. ne ſoient repleviſable.*

2. *Juſtices of Gaol Delivery*, who may bail in caſes where Juſtices of Peace

Peace cannot, if it be of a thing within their cognizance.

§. As a perſon convict of Manſlaughter *Se defendendo*;

§. Or a perſon convict of Manſlaughter, that hath a Pardon to plead.

3. Juſtices of Peace.

§. 1. They cannot Bail in any caſe, but where they have cognizance of the cauſe; therefore if taken upon Proceſs of Rebellion out of *Chancery* they cannot bail.

2. The *Statutes* that give power to Juſtices of Peace to bail in caſe of Felony, are 3 *H.7.c.*3. 1 & 2 *Ph.* & *Ma, c.* 13. upon which two kinds of Bailments.

1. Upon the firſt Accuſation, and before Examination, and that doubtleſs muſt be done,

1. By two Juſtices, whereof one of *Quorum*.

2. After Examination taken concerning the Offence. Cr. 156.

2. After Commitment: And though ſome Opinion be that he may be bailed by one Juſtice, yet it ſeems

ſeems otherwiſe ; for the *Stat.* of 1 *R.* 3. that gave power to one, ſtands repealed by 3 *H.*7.

3. After Indictment and Proceſs thereupon iſſued in caſe of Treſpaſs or Miſdemeanour, or Penal *Statute*, not prohibiting Bail, he may be bailed by two Juſtices, whereof one of the *Quorum*; and by ſome by one Juſtice, and thereupon may grant a *Superſed.* to the *Exigent.* But it ſeems this holds not upon a Proceſs upon Indictment of Felony. *Quære.*

4. The Sheriff, Baily, or Officers which was of Indictment before them: But theſe are removed from that power, as it ſeems by the *Stat.* 28 *E.*3.*c.*9.

1 *E.*3. 4.*c.*3. whereby they are not to make Proceſs, but to remove them to the Seſſions of the Peace.

Rumper

Rumper Priſon.

NOW having conſidered the Perſons that may Arreſt and Bail, it makes way to conſider the Offence againſt ſuch Arreſt or Impriſonment, by breaking ſuch Priſon,&c. And herein enſues the ſecond Conſideration.

2. What *a Priſon* within this *Statute?*

1. The Stocks.
2. The Priſon of a Lord of a Franchiſe.
3. The Cuſtody of any that Lawfully arreſts, or the Houſe of the Conſtable, or other perſon where detained.
4. The Church, where a perſon abjuring is.
5. The Priſon of the Ordinary, which is now ouſted, *Stat.*23 *H.*8.*c.*11.

3. What

3. What *a breaking?*

If the Priſon be fired without the privity of the Priſoner, he may lawfully break it to ſave himſelf.

2. If a Gaoler do voluntarily permit him to eſcape, Felony in the Gaoler, not in the Priſoner; but if negligent, Felony in the Priſoner, and Miſdemeanour in the Gaoler.

3. If Priſoner under Cuſtody be reſcued, or Priſon broke by Strangers without his procurement, no Felony in the Priſoner.

4. Going out the Doors open, no Felony; for the *Statute* requires an actual breaking.

4. *Niſi cauſa; tale judicium, &c.*

1. If *A.* mortally wound *B.* and is committed, and he break Priſon, and *B.* then die, no Felony.

2. If a Felony made by a ſubſequent *Statute*, and an Offender committed therefore, break Priſon, Felony.

3. Com-

3. Committed for ſuſpicion of Felony, yet if a Felony done, breaking Priſon Felony.

4. If the Offence for which the party was committed appear not by Matter of Record, neceſſary a Felony be done, elſe breach of Priſon no Felony.

But if it appear by Matter of Record, and the party taken by *Capias*, if he break Priſon, Felony, though no Felony done.

5. If Felony was done, yet breach of Priſon no Felony, unleſs a lawful *Mittimus*, *de quo ſuprà*.

6. The Indictment for the breach muſt be Special, that it may appear he was committed for Felony.

5. *Tale Judicium requirit.*

1. Breach of Priſon turns into Felony only, though the party were committed for Treaſon.

But if a Priſoner break a Priſon wherein Traytors are, to let out the Traytors, this is Treaſon.

2. A man impriſoned for Petit Larceny, or *Se defendendo*, breaks Priſon, no Felony.

3. If a Priſoner break Priſon, he may be Arraigned of that before he be convict of the firſt Felony.

V.Dalt.331. But a Gaoler permitting a voluntary Eſcape ſhall not be Arraigned till the Priſoner be firſt Attaint; for if the Priſoner be acquit, the Eſcape diſpuniſhable.

Eſcape.

Eſcape in the Party.

Nota, If a Perſon eſcapes before Arreſt, not puniſhable in him as Felony; but for the Flight, he forfeits Goods when preſented.

In caſe a man ſlain in the day, if the Offender Eſcape, Townſhip amerced. *Vide ſupra.*

Iſſint ſi ſoit dangerouſment Wound. 3 H 7 c. 1. *Et ſi ſoit vill immure ſer' amerce, ſoit ceo in jour ou nuit*, 3 E. 3. Coron. 299. Stat. Winton, cap. 4.

Eſcape in the Officer, or him that makes Arreſt.

THis is either in caſe of Arreſt,
1. By a Stranger.
2. By an Officer.

If *a Stranger* Arreſt a man for Felony, or ſuſpicion thereof, and deliver him over to four others, and they receive him and let him go at large, this is an Eſcape in both; for the firſt man ſhould have delivered him to the Conſtable; and the latter ſhould not have let him go at large.

And the ſame Law ſeems to be for an Eſcape by a Stranger that hath a Priſoner in his Cuſtody, as for an Officer in caſe of Eſcape voluntary or negligent.

Eſcape

Eſcape by an Officer.

ESCape of an Officer.

1. *Negligent.*

1. Bailing a perſon not bailable, through ignorance, by one that hath power to bail; a negligent Eſcape.

But it ſeems if done by a Gaoler a voluntary Eſcape; becauſe he hath no ſuch power.

2. The ordinary puniſhment of a Negligent Eſcape.

1. Of a party Attaint, 100 *l.*

2. Of a party Indict, 5 *l.*

3. Of a party not Indict, at diſcretion.

3. For Inſufficiency of the Gaoler, the Sheriff muſt anſwer for Negligent Eſcapes.

4. A Gaoler *de facto*, though not *de jure*, muſt anſwer for Eſcapes.

5. If after a negligent Eſcape the Gaoler retake him upon freſh Suit before he be puniſhed, it excuſeth.

If the Conſtable bring a perſon to Gaol, the Gaoler refuſeth him, the Vill ſhall be charged, and Gaoler fined.

2. *Voluntary* Eſape.

St. 14 E. 3. c. 10. 1. Hath the ſame Crime that the perſon permitted to Eſcape ſtood committed for, *viz.* Treaſon or Felony.

2. But this is in the immediate perſon that permits it; and therefore though civilly the Sheriff muſt anſwer for Offences of Gaoler, yet not criminally.

3. There muſt be a Felony really done, and a Commitment by a lawful Warrant.

4. If within the year the Priſoner be acquitted upon Indictment, yet a voluntary Eſcape is puniſhable as Felo-

Felony, becauſe Wife intituled to her Appeal.

5. The Eſcape if voluntary, puniſhable *ut ſupra*, though the Priſoner were not indicted. Dalt. fo. 335. Dyer 99.

Reſcue.

1. A Hindrance of a perſon to be arreſted that has committed Felony is a Miſdemeanor, but no Felony.

2. But if the party be arreſted, and then reſcued, if the arreſt was for Felony, the Reſcuer is a Felon; if for Treaſon, a Traytor; becauſe they are all Principals.

But he ſhall not be arraigned till the Principal attainted; and if the Principal die before attainder, the Reſcuer ſhall be fined and impriſoned.

3. There muſt be a Felony really done, and a lawful Commitment.

N. *Reſcue hors de cuſtody de Conſtable, &c. eſt Felony, licet ne fuit ameſne al Gaol.*

Felonies by the Statute. C.Pl.C.c.4.

3. H *En.*7 *cap.*14.
Imagining and *conſpiring* to kill the King, or any of his Council.

§. Clergy not taken away.

1 *Jac.c.*12.

§. *Witchcraft, de quo ſupra.*

§. 25 *H.*8. *c.*6. Revived by 5 *El. c.*17.

Buggery with Man or Beaſt.

§. Without benefit of Clergy.

Debet eſſe Penetratio, as well as *Emiſſio.*

In this and Rape *carnaliter cognovit.*

13 *E.*1.*c.*34.

Rape: This was Felony at Common Law; then by *Stat. Weſtm.* 1. *c.* 13. made but a Miſdemeanour; then by this *Statute* reſtored to Felony again.

And hence it is that it is not inquirable in a Leet, becauſe though no Felony; yet it loſt its nature by *W.*1.*c.*13. C. *fur ten Stat.*

Nul Appeal done al party.

18 *E.*3. *Coron.* 169.

If the Woman be under ten years, then though ſhe conſent, yet by *Stat.* 18 *El.c.*6. it is a Rape; if above ten years, if ſhe conſent not, a Rape, though ſhe conſent after.

But in ſuch caſe of a ſubſequent conſent, the *Stat.*6 *R.*2.*c.*6. gives the Appeal to the Husband, if none to the Father,&c.

Clergy taken away by *Stat.*18 *El. c.*7. upon Conviction by Verdict, or Confeſſion, or Utlawed.

Ceſtuy que aid in Rape eſt Raviſtor. 11 *H.*4.13.

3. *H.*7. *c.*2.

Taking a Woman againſt her Will and marrying her, Felony.

1. Such Maid, Widow, or Wife Muſt have Lands, Tenements, or Goods, or be Heir Apparent.

2 She muſt be taken againſt her Will.

3. She muſt be married or defiled.

4. Extends not to taking a Ward or Bondwoman.

Nota,

Nota, The taking away in one County, and marrying in another, indicted where married; and they may enquire of the forcible taking. 2. Privy to the Marriage, but not to the Force, not Guilty. 3. Marriage with Consent not excusing so long as she is under the Force, 13 *Car. Fulwood's* Case.

All Accessories before or after, made Principals by this Act.

Clergy taken away by *Stat.* 39 *El. c.* 2.

5 *H.*4. *c.*5.

Malicious cutting out Tongue, or putting out Eyes, Felony.

Clergy not taken away.

Extends not to cutting off Ears.

8 *H.*6. *c.* 12.

Stealing, carrying away or avoiding Records, Felony. And

The Judges of either Bench enabled to hear and determine the same.

Accessories before made Principals.

§. Clergy allowable.

5 *H.*4. *c.*4.

Multiplication of Gold or Silver, Felony.

1 *H* 7. *c.* 1.

Hunting unlawfully in Foreſts, Chaſes, or Warrens with painted Faces by Night, and Reſcuers, *viz.* other than the party arreſted, Felony.

31 *El. c* 4.

Imbezelling the King's Armour, &c. Felony.

Qualifications:

1. Ought to be mpeached within a year.

2. Offender loſeth Lands but during life.

3. No Corruption of Blood.

4. Wife loſeth not Dower.

5. Defendant admitted to proof.

3 *Jac c.*4

Subjects paſſing Sea to ſerve foreign Prince, not having taken Oath of Obedience:

No Corruption of Blood:

Offender may have Clergy.

Articuli.

Articuli ſuper Chartas, c.2.

Purveyors Felons in certain Caſes:

§. They may have Clergy.

39 *El. c.17.*

Wandring Souldiers, Felons in certain caſes.

§. Excluded of Clergy.

18 *H.6.c.19.*

Souldiers retained, as is preſcribed in the Act, departing from their Captains without licenſe.

§. 2 *E.6.c.2. ad idem.*

§. Clergy excluded.

1 *Jac.* 12.

Marrying a ſecond Husband or Wife, the former living, Felony: Except Caſes following;

1. The Man under fourteen, or the Wife under twelve at time of firſt Marriage, and not agreeing after firſt Eſpouſals, may marry a ſecond Husband or Wife.

2. A Man or Wife abſent above ſeven years, ſecond Marriage no Felony: If beyond Sea, though notice of

1 Jac. 11. of life: If in *England*, then without notice.

3. After a Divorce, though *à menſa & thoro* only.

4. After a Nullity declared of the former Marriage by Eccleſiaſtical Court,

Offenders have Clergy.

1 *Jac. c.* 31.

§. For going with a Plague Sore; but this diſcontinued.

14 *El.* 3. 20.

Gaoler compelling Priſoner by Dureſs to become Appellor, Felony, whether the Appellees be acquitted or not.

3 *H.* 5. *c.* 1.

Coining, or bringing in Gally half pence, Suskins, or Dodkins.

§. And 2 *H.* 6. *c.* 9. payment of Blanks,

Offender hath Clergy.

17 *E.* 3. *n.* 15.

Tranſportation of Silver, or Importation of falſe Mony, made Felony,

Offender hath Clergy.

18 *H.* 6. *c.* 15.

Expor-

Exportation of Wool or Woolfells, other than to the Staple of *Calais*.

37 *E.*3. 19.

Stealing Falcons,&c. or concealing the ſame after Proclamation, Felony.

Offender hath Clergy.

3 *H.*6. *c.*1.

Congreation of Maſons to prevent *Statutes* of Labourers:

§. But this Obſolete by the *Statute* 5 *El.* the Acts to which it relates are repealed.

27 *El.c.*2.

Receiving, retaining, or maintaining a Jeſuit or Popiſh Prieſt knowingly,

Clergy excluded.

35 *El.c.*1.

Felony refuſing to make Abjuration, or after Abjuration not to depart, in ſome caſe,

Clergy excluded.

1 & 2 *Ph.* & *M.c.*4.

Egyptians above fourteen years, remaining here a Month.

§. And 5 *El. c.* 20. takes away Clergy.

39 *El.*

39 *El.c* 4. 1 *Jac.c.*7.25.

Dangerous Rogue adjudged to the Gallies; and returning without licenſe, Felony:

§. But Offender hath Clergy.

§. But branded Rogue, Felon, and no Clergy.

5 *El.c.*14.

Forging a Deed after a former Conviction.

C.PC. f.172. If a man be convict or condemned of publiſhing a forged Deed, and after he forge a Deed, this is Felony.

If the Offence were after a former, but before Conviction thereof, no Felony.

Clergy ouſted.

8 *El.c.*3.

Sending Sheep beyond Sea after a former Conviction.

Clergy allowed.

33 *H.6.c.*1.

Servants after deceaſe of their Maſter, riotouſly ſpoiling Goods, &c.

Offenders ſhall have Clergy

21 *H.* 8. 7.

Servants imbezelling Goods of their Maſters delivered to them, Felony;

But the *Statute* of 27 *H.*8. *c.* 17. that took away Clergy, being Repealed by 1 *E.*6 *c.* 12. they may now have Clergy.

22 *H.* 8. *c.* 11. 2 & 3 *Ph.* & *Ma.* *c.*19.

Cutting Powdike, Felony,
Offender hath Clergy.

43 *El.c.* 13.

Detaining perſons in *Cumberland*, &c. againſt their Will, and giving or receiving Blackmail, &c. Felony,
Without Clergy.

Miſpri-

Miſpriſions.

NOW we come to Offences Criminal, but *not Capital*; and thoſe of two kinds:

1. Offences by Common Law:

2. Offences againſt ſpecial *Statutes.*

Offences by *Common Law* not Capital, are either greater Offences or leſſer:

Greater; and thoſe come under name of *Miſpriſions*, which again are of two ſorts:

Negative, in not doing that they ought, or of Omiſſion.

Poſitive, in doing ſome great Miſdemeanour they ought not.

Miſpriſion.

Miſpriſion of Treaſon.

The Negative *Miſpriſions.*

1. MIſpriſion *of Treaſon.*
All Treaſon includes Miſ- 2 R. 3. 9.
priſion: The Concealing of any C.PC.c.3.
Treaſon, is declared Miſpriſion only by the *Statute* of 1 & 2 *Mar.c.*10. *que induce auxi miſpriſion.*

But this in caſe of bare knowledge: for if knowledge and Aſſent, it is Treaſon: and though the Treaſon be by *Statute*, yet the concealing thereof is Miſpriſion of Treaſon.

Every man therefore that knoweth a Treaſon, muſt with all ſpeed reveal it to the King, his privy Council, or other Magiſtrate.

He that receives and comforts a C.PC.c.64.
Traytor knowingly, be it a Counterfeiter of Coin or other, is a Principal Traytor, and not only guilty of Miſpriſion. *Abingdon*'s Caſe againſt the Opinion in *Dyer* 296. *Conier*'s Caſe.

The

The *Judgment* in caſe of Miſpriſion of Treaſon is Impriſonment during life, forfeiture of Goods, forfeiture of profits of Land during life.

Nota, *Si un conuſt un que ad counterfeit Coigne, & ne luy diſcover, eſt Miſpriſion de Treaſon. Mes ſi un ſolement utter counterfeit coigne ſciant ceo eſtre counterfeit n'eſt Miſpriſion de Treaſon, mes ſerra Fine & Impriſon. Iſſint reſolve a* Newgate 1661.

Miſpriſion

Miſpriſion of Felony.

2. MIſpriſion *of Felony*, is either by Common Law, or by *Statute*.

By the Common Law a concealment of a Felony, or procuring of the concealing thereof.

The Puniſhment.

1. If a common Perſon, Fine and Impriſonment.

2. If an Officer, as Sheriff, Coroner, Impriſonment for a year, and Ranſom at the King's pleaſure, by *Stat. W.* 1 *c.* 9.

By the *Stat.* 3 *H.* 7 *c.* 1. 33 *H.* 8 *c.* 6. one knowing of an unlawful Aſſembly, and not diſcovering it within 24 hours.

Concealment of Jurors, *vide Stat.*

Theftbote.

3. *Heftbote*, which is more than a bare Miſpriſion of Felony, and is where the Owner doth not know the Felony, but takes his Goods again, or other Amends, not to Proſecute.

But taking the Goods again barely, no offence, unleſs he favour the Thief.

The puniſhment hereof is Ranſom and Impriſonment.

Miſpriſions

Miſpriſions Poſitive, *or of Commiſſion.*

1. Diſcovery by one of the Grand Inqueſt of the perſons Indicted, or Evidence againſt them, Miſpriſion, puniſhable by Fine and Impriſonment, but no Felony, nor Treaſon. C. PC. c. 46.

2. A perſon diſſuading Witneſſes from bringing in Evidence againſt a Felon is no Acceſſory, but a great Miſpriſion, puniſhable by Fine and Impriſonment. C. PC. c. 64.

3. Reproaching a Judge, aſſaulting an Attorney againſt him, or abuſing a Juror that gave verdict againſt him; a great Miſpriſion, puniſhable by Fine and Impriſonment.

4. Reſcuing a Priſoner from the Bar of the Courts of *B. R. Canc. B. C.* or *Exchequer*, a Miſpriſion for which the party ſhall loſe his Hand, Goods, Profits of Lands, during Life, and perpetual Impriſonment.

5. If a man ſtrike ſitting the four Courts at *Weſtminſter*, in the pre-

ſence of the Court, the like Judgment

6. If in preſence of thoſe Courts, or before Juſtices of Aſſize or *Oyer & Terminer*, a perſon draw his Sword upon any Judge or Juſtice, though he ſtrikes not, or ſtrike another, like Judgment.

7. By *Stat.* 33 *H.*8.*c.*12. ſtriking in the King's preſence, drawing blood; loſs of Hand and perpetual Impriſonment, Fine and Ranſom.

8. By *Stat.* 14 *El. c.*3. forging of Money not current, Miſpriſion of Treaſon.

9. Stranger uttering falſe Money made within this Realm, knowing it Counterfeit, 3 *H.*7.10.

10. A Lord of Parliament, departing from Parliament, 3 *E.*3.

Maihem.

Maihem.

AND hither we may refer *Maihem*, which though it be a particular Crime, for which Appeal lieth, yet it is not Felony of death.

Cutting off the Hand, or ſtriking out a Tooth, Maihem; but not cutting off the Ear. C. CP. c. 40.

The Judgment is only Fine and Damages; and therefore if recovery in Treſpaſs, it is a good bar in Appeal of Maihem.

Offences not Capital.

OFfences of an Inferiour nature: They are either ſuch as are committed by an Officer:

Neglect of Duty,
Bribery,
Extortion.

Or ſuch as refer to a common perſon, without relation to Office, and thoſe reducible to three kinds:

1. Breaches of publick Peace, and therein,
   1. Of Affrays.
   2. Of Riots.
   3. Of Forcible Entries.
   4. Barretries.
   5. Riding armed.
2. Deceipts and Cozenage.
3. Nuſances.

Decay of Bridges.
Decay of High ways.
Inns and Alehouſes.

Breach

Breach of the Peace.

AFFRAY,
If Weapons drawn, or ſtroke given or offered; but Words no Affray: Menace to kill or beat; no Affray; but yet for ſafeguard of Peace, Conſtable may bring them before Juſtice.

In Affrays conſiderable,

1. What a *private Man* may do?

Private perſons may ſtay Affrayers till heat over, and deliver them to Conſtable.

If perſon hurt another dangerouſly, private perſon may arreſt the Offender, and bring him to Gaol or next next Juſtice. Dalt. c.8.

2. What by a *Conſtable*?

1. Affray in preſence of a Conſtable, he ought to do his endeavour to ſuppreſs it, otherwiſe finable.
2. If an Affrayer fly to a houſe, or if made in a houſe, Con-

ſtable may break open houſe to preſerve Peace, or take the Offender.

3. If in Affray Aſſault be made upon the Conſtable, he may ſtrike again, or impriſon Offender.

4. Conſtable may in ſuch caſe impriſon, till he find Surety of Peace.

5. But it ſeems if Affray paſt, and not in view of Conſtable, he cannot impriſon without Warrant of the Juſtice, unleſs Felony done, or like to be done.

3. What by a *Juſtice?*

1. In his preſence, the ſame Power that a private perſon or Conſtable, and may impriſon till Surety of Peace found; the like upon Complaint.

2. If dangerous hurt, Juſtice may impriſon till appear whether the party die or live, or bail the party.

The former better diſcretion.

Riot.

When above the number of Two meet to do ſome unlawful act, and do act it; but if they meet and act it not, an unlawful Aſſembly, in power of Juſtices to ſuppreſs them, 13 *H.*4. *c.*7.

A man for ſafeguard of his houſe againſt Malefactors or Treſpaſſers, may aſſemble his Friends for his Defence.

But he cannot aſſemble to prevent a beating threatned in his preſence.

Riot recorded by one Juſtice upon view traverſable; by two, not, becauſe purſuant to the *Statute*.

Forcible

Forcible Entry.

Forcible Entry muſt be either
Manu forti,
Furniſhed with unuſual Weapons,
Menace of life or limb.
Breaking open door:
Contra, it ſeems, if door only latched,
Ejecting forcibly the poſſeſſors.
Cum multitudine gentium, one may commit a Force, three at leaſt a Riot.

Forcible

Forcible Detainer.

Menacing the Poſſeſſor to go out upon pein of loſs of life or limb.

Unuſual Weapons or Company.

§. Refuſing to admit the Juſtice to come in to view the Force.

Detainer with Force juſtifiable, where party in poſſeſſion Three years:

§. But though his Poſſeſſion lawful, yet if within the Three years actually removed, though reſtored by the Juſtices, enables not a Detainer with Force.

But if the Three years Poſſeſſion hath been by Force, then the laſt Forcible Detainer puniſhable, and hinders not Reſtitution.

If a Diſſeiſee within the Three years make lawful Claim, this an interruption of his Poſſeſſion.

Reſtitution.

Reſtitution.

1. *By whom?*

1. Juſtices *B. R.* may reſtore upon Indictment removed before them.

2. One Juſtice of Peace cannot reſtore upon an Indictment before them; nor Seſſions of Peace, unleſs upon Indictment found at Seſſions.

3. It ſeems Juſtices of Gaol Delivery or *Oyer* and *Terminer*, cannot Reſtore.

2. *How?*

Upon View.

Upon Indictment?

Muſt be ſufficient,

Adhuc extra tenet.

If Erroneous, may be ſuperſeded by the ſame Juſtice before Executed: After it is Executed, then Re-reſtitution in *B. R.* upon Indictment quaſhed.

Reſti-

Reſtitution *ſtayed.*
By *Certiorari.*
By quaſhing Indictment.
By pleading thereunto, which is nevertheleſs in diſcretion.

Barretry.

Barretry.

Riding Armed.

Going Armed.

Vid. *Stat.* 20 *R.*2. *c.*1. 7 *R.*2. *c.*13. 2 *E.*2. *c.*3. *Stat. Northampton.*

Nuſances.

Nuſances.

Bridges Publick.

Are not chargeable upon a particular Perſon, but *Ratione tenuræ.*

But of Common Right, repairable by the whole County.

The manner of Repairing directed by *Stat.*22 *H.*8,*c.*5.

High-

High-ways.

HIgh-ways: Provisions,

1. For their *Enlarging* and removing Trees within 200 Foot of either side.

13 *E.* 1. *c.*5.
5 *El. c.* 15.

2. For their Amending *vide* the *Stat.*

5 *El. c.* 13.
29 *El. c.*5.
2 & 3 *P. M. c.*8.

The *Charge* of Repair of High-ways lies of common right upon that Parish wherein they are, unless,

1. A Special Prescription cast it upon another.

2. Unless the Owner of the Land, in which they are, inclose it, then it must be cast upon the Owner.

But they that have Ditches on either side ought to scour them, 8 *H.* 7. 5.

Inns,

Inns.
Ale-houſes.
Bawdy-houſes.
Gaming-houſes.

Common Inns.

1. ANy perſon may erect a Common Inn, ſo it be not *ad nocumentum.*

1. In reſpect of their multitude, when there are enough ancient Inns before.
2. In reſpect of the inconvenience of the place or ſituation.
3. In reſpect of Diſorders there permitted.

All which are Common Nuſances, and may be preſented and fined.

2. He that erects a Common Inn, and *refuſes to entertain* Gueſts, may be Indicted and fined for the ſame.

3. If a Common Inn, contrary to *Statute*, ſuffer perſons to tipple there as Ale-houſes, he may be compelled to be bound, or may be ſuppreſſed as Ale-houſes, or may be indicted at Seſſions.

Ale-

Ale-houſes.

SEe for *Ale-houſes*, the ſuppreſſing of them, and the puniſhing of Tipling in them, 5 *E.* 6. *c.* 25. 1 *Jac. c.* 9. 4 *Jac. c.* 5. 7 *Jac. c.* 10. 21 *Jac. c.* 7. 1 *Car. c.* 4. 3 *Car. c.* 3.

An Ale-houſe-keeper ſuppreſſed, according to the *Stat.* of 5 *El.* 6. *c.* 25. by two Juſtices, whereof one of the *Quorum*, cannot be allowed but in open Seſſions.

An Ale-houſe-keeper ſuppreſſed for the Offences 7 *Jac. c.* 18. 21 *Jac. c.* 7. for ſuffering Tipling, or 7 *Jac. c.* 10. for ſelling leſs than is there directed, or 21 *Jac. c.* 7. for continuing drinking in another Ale-houſe, or 21 *Jac.* for being drunk, cannot be licenſed in three years, and if he be, ſuch Licenſe void.

5 & 6 *E.* 6. *c.* 25.

None to ſell Ale, &c. unleſs licenſed in open Seſſions, or by two Juſtices, one of the *Quorum*.

Perſons licenſed to be bound by Recog. not to keep unlawful Games, and for uſing good Order.

Recog. return next Quarter Seſſions.

Proceſs upon Recognizance at Seſſions.

Perſons unlicenſed keeping Alehouſe impriſoned by two Juſtices, one of the *Quorum*, for three days, and till Recogn. given not to ſell Ale.

Certificate of ſuch Recogn. Conviction, and Fine 20*s*.

1 *Jac. c* 9.

Ale men, Inn-keeper or Victualer *ſuffering* Inhabitant to ſit *tippling*, forfeit 10 *s*. to the Poor.

Conviction before one Juſtice, &c. by two Witneſſes.

Penalties levied by Conſtables, and Churchwardens by diſtreſs and ſale within ſix days.

In default of diſtreſs Offender committed till payment *per* Juſtice.

Conſtable, &c. neglecting to levy or certifie default of diſtreſs, forfeits 40 *s*.

4 *Jac. c.5.*

Perſon drunk forfeits 5 *s.* to be paid within a Week after Conviction, to the Poor: If neglect, levy by Diſtreſs, by Warrant from Juſtice: If not able to pay, commit to Stocks for ſix hours.

Conſtable neglecting duty, forfeits 10 *s.* to the uſe of the Poor.

Any perſon *ſitting tippling*, dwelling in the ſame Pariſh, forf. 3 *s.* 4 *d.* to Poor, proved before Juſtice, levy *per* diſtreſs, and for want of diſtreſs commit *per* Juſtice to Houſe of Correction.

Second Offence, bound to good Behaviour.

Conſtables, &c. bound by Oaths to preſent Offences.

Puniſhment within ſix Months.

21 *Jac. c.7.*

Former act extend to Foreigners, as well as Inhabitants.

One Witneſs ſuffice to convict, or view of Juſtice.

Ale-houſe ſuppreſs, not licenſed for, three years, *per Stat.* 7 *Jac. c.*10.

1 *Car. cap.* 4. Former *Statute* extend to Inn keepers and Taverns.

Offences

Offences not Capital by Statute.

OFfences not Capital more particularly *by Statute.*

Forgery by *Stat.* 5 *El. c.*14.

Perjury, and Subornation thereof, 5 *El. c.*9.

Champerty, *Embracery* and *Maintenance*, 32 *H.*8. *c.*9.

Ingroſſing, *Foreſtalling*, and *Regrating*, 5 E. 6. c. 14.

Salt Victual within *Statute*.

Apples and Cherries, &c. no Victual.

Mault ſeems not, but Corn and Grain expreſly Victual by 5 *Ed.* 6.

A Stranger, or Subject, bringing Victual into the Realm, may ſell them in groſs, but the Vendee cannot; neither may any Merchant buy within the Realm, and ſell in groſs.

Attempting to inhance the price of Merchandize, a kind of Foreſtalling.

Selling Corn in the Sheaf, unlawful.

Matters

Matters of Religion.

1. REviling the Sacraments, Impriſonment, Fine and Ranſom, 1 *E.6. c.* 1. *Repealed*, 1 *Ma.c.*2. revived 1 *El.c.*7.

2. Not coming to Church to hear Common Prayer, by 5 *E.6. c.*1. ſubject to Church Cenſures.

Nota 3 *E. 6. c.* 1. ſetled a Book of *Common Prayer*; Injoyned the uſe: Refuſing to uſe it, uſing other, or depraving it, Impriſonment for ſix Months for firſt Offence, twelve Months for ſecond, during life for third.

5 *E. 6. c.* 1. Alters the Prayers; but applies the Penalty to the new Book.

Nota, *Repeal* 1 *Ma.* that *Repealed* 1 *Jac.c.*25.

1 *El. c.* 2. Enacts the uſe of the Book of 5 *E.6.* with ſome Alterations.

Any that,

1. Refuſe to uſe it:
2. Uſe another form:
3. Deprave

3. Deprave it.

§. If Spiritual, ſix Months Impriſonment firſt Offence, one years Impriſonment ſecond Offence, Deprivation third Offence.

If Lay, firſt Offence 12 Months Impriſonment, ſecond Offence during life.

Depraving Book of Common Prayer, firſt Offence 100 Marks, ſecond Offence 400 Marks, third Offence forfeit Goods and Impriſonment during life.

8 *El. c.* 1. touching Conſecrating Biſhops.

Concerning repair to Church.

1 *El.* 2. Every Sunday and Holy-day, *ſub pœna* 12 d. *per diem.*

§. 23 *El. c.* 1. 20 l. *per menſem* for abſenting; and if abſent twelve Months upon Certificate, bound to good Behaviour.

29 *El. c.* 2. Conviction of Recuſancy.

35 *El. c.* 1. Penalty of diſſuading from Church, holding of Conventicles, commit to Priſon without bail until Conformity.

Non-

Nonconformity within three Months after Conviction, ſhall abjure the Realm.

Not departing, or returning, Felony without benefit of Clergy.

Submitting, diſcharged of the Penalty by this Act.

Relapſing loſeth the benefit of the Submiſſion.

Ten pounds *per menſem* for every perſon retaining or relieving Recuſant after Notice.

Cap. 2. Recuſants not to remove five Miles from dwelling.

1 *Jac. c.* 4. Conformable Heir of a Recuſant diſcharged: Third part diſcharged of forfeiture.

Penalty of ſending Children to Seminaries.

3 *Jac. c.* 4 & 5. Penalty for refuſing Oath of Supremacy.

1 *El. c.* 1.

5 *El. c.* 1.

Of Obedience,

3 *Jac. c.* 4.

7 *Jac. c.* 6.

Kings

King's Bench.

NOw we come to consider of the *Proceeding* against a party for Felony, and therein,

1. Concerning the *Jurisdiction or Court* wherein Proceedings are to be had in Capital Causes; and those are principally,
   1. The King's Bench.
   2. Justices of Gaol Delivery.
   3. Justices of Oyer and Terminer and Assizes.
   4. The Sheriff and Coroner.
   5. The Lord Steward of the Houshold.

The *King's Bench*, the Supream Court of Criminal Jurisdiction. It is a Court of Oyer and Terminer, Gaol Delivery, and Eyre, in that County where it sits.

9 Rep. *Sanchar's* Case.

By the coming of the King's Bench into any County, during the sitting thereof in that County, all power and proceedings of Commissioners of Oyer and Terminer is suspended.

But

But a Special Commiſſion of Oyer and Terminer bearing *Teſte* in the Term may be granted; and King's Bench may adjourn, and then they may ſit. C. PC. p. 27.

Where the King's Bench proceeds upon an Offence committed in the ſame County, there need not fifteen days between the *Teſte* and Return of the *Venire facias*: But if they proceed upon a Cauſe removed by *Certorari*, they muſt have fifteen days. 9 Rep. *Sanchar's* Caſe.

Gaol

Gaol Delivery.

C. Jur. Courts ſub hoc titulo.

1. THe Juſtices of Peace ought to deliver the Indictments not determined unto thoſe Judges, and they may Arraign any perſon in Priſon upon them.

2. They may take Indictments againſt any perſon in Priſon, and ſo may Juſtices of Oyer and Terminer, and herein they have a concurrent Juriſdiction.

3. They may take a Pannel returned by the Sheriff without a Precept.

4. They may deliver by Proclamation perſons ſuſpected, where there is no Evidence to indict them.

5. May award Execution of perſons in Priſon utlawed before Juſtices of Peace,

6. May aſſign Coroner to an Appeal, and make Proceſs againſt the Appellee in a Foreign County.

7. May puniſh thoſe that unduly bail Priſoners, *Stat. de Finibus*, 1 & 2 *Ph. & Ma. c.* 13.

8. May

8. May deliver the Gaol of perſons committed for High Treaſon.

9. May receive Appeals by Bill againſt perſons in Priſon.

10. By *Stat.* 9 *E.*3.15. muſt ſend their Records into the Treaſury of the Exchequer at *Michaelmas*.

11. Others may be added to the former Commiſſion by Commiſſion of Aſſociation, or their power committed to fewer by *Si non omnes*.

12. By *Stat.* 2 & 3 *Ph.* & *Ma.* *c.* 18. a General Commiſſion of Gaol Delivery through the County determines not a Special Commiſſion granted in a Corporation,&c. parcel thereof.

13. By *Stat.* 1 *E.* 6. *c.* 7. the ſubſequent Commiſſioners of Gaol Delivery, power to give Judgment upon ſuch as were Reprieved before Judgment by former Commiſſioners and Proceſs before any former Commiſſioners of Peace, Gaol Delivery, Oyer and Terminer, or others not diſcontinued by granting new Commiſſions.

If a Priſoner be bailed, he is yet in

in Priſon to be Arraigned before theſe Juſtices, for he is a Priſoner: contrary in caſe of Mainprize, 21 *H.* 7. 33. 9 *E.* 4. 2. 39 *H.* 6. 27.

Cr. Jur. 226. Although their Commiſſion determine with their Seſſion, after they are gone, they may command a Reprieve or Execution, *Dyer* 205.

Licet ſoit ad Gaolum deliberandum hac vice uncore pnt' adjourner lour Commiſſion. Cr. Jur. 226.

Commiſſion d'Oyer & Terminer, & Gaol Delivery, pnt' Eſtoyer enſemble, Ibid. Bro. Commiſſion 24.

Juſtices de Gaol Delivery & Oyer & Terminer, pnt' enquire per ambideux powers, and make up their Records accordingly, 9 *H.* 7. 9. *Cr. Jur.* 226.

Oyer

Oyer and Terminer.

1. THe Juſtices Authority muſt be by Commiſſion, and not by Writ, otherwiſe their Proceedings void. 42 *Aſſ.* 12.

2. They cannot proceed but upon an Indictment taken before themſelves.

3. By good Opinion they may proceed the ſame Day or Seſſion againſt a party Indicted before them. *Nota le contrar' ad eſtre adjudge.*

4. Where Offences are limited to be heard and determined in any Court of Record, generally it may be heard and determined by them. *Quære*, for *Gregory*'s Caſe *contra.* Vid. *Dyer* 236.

5. Others may be added, or their Power contracted by Aſſociation, or *Si non omnes*, as before.

6. One ſitting without Adjournment determines their Commiſſion.

7. Juſtices of Oyer and Terminer, or of Peace, cannot aſſign a Coroner, as Juſtices of Gaol Delivery may.

8. By *Stat.* 9 *E.* 3. they are alſo to ſend their Records determined into the *Exchequer.*

V. 12 Aſſ. 21. 9. A *Superſedeas* ſuſpends their power, and a *Procedendo* revives it; but a new Commiſſion determines it; the like of Commiſſion of *Niſi prius*, &c. but it determines not without Notice.

1. By ſhewing the new Commiſſion.

V. 2 & 3 P. & M. c. 10. 2. Or proclaiming it in the County.

3. Or Seſſions held by new Commiſſion.

10. An Award upon the Roll not ſufficient to return a Jury, but a Precept under Seal of the Commiſſioners.

11. And *Nota*, That a Special Commiſſion of Oyer and Terminer may be granted to ſit in one County to hear and determine Treaſons, &c. in another, but then the Indictment muſt

must be found in proper County, and the Trial by Jurors of proper County. *C.PC.fo.27.*

Justices of Assize.

BY *Stat.* 27 *E.* 1. *c.* 3. *de finibus* Justices of Assize have power to deliver Gaols of Felons and Murtherers.

And by some Opinion they may do it *virtute Officii*, without any Special Commission. *S.P.C.c.* 5.

But in case of Counterfeiting Coin,&c. upon *Stat.* 3 *H.*5. *Stat.*2. *c.* 7. they must have a Special Commission.

Juſtices of Peace.

THe *Statute* of 18 *E.* 3. *c.* 2. gives them power by Commiſſion to hear and determine Felonies and Treſpaſſes againſt the Peace.

But then there muſt be a ſpecial Clauſe in their Commiſſion, *Necnon ad aud' & terminand' felonias*, &c. Otherwiſe they cannot do it. S.P.C.L.2.c.5.

Yet that Clauſe doth not in propriety make the Juſtices of Peace Juſtices of Oyer and Terminer, becauſe that it is a diſtinct Commiſſion; and therefore a *Statute*, as that of 5 *El. c.* 14. limiting Forgery to be heard and determined before Juſtices of Oyer and Terminer, gives not the power therein to Juſtices of Peace; but the Juſtices of the King's Bench are Juſtices of Oyer and Terminer within this *Statute*. V.C.P.C.c.14. Dal.c.20. 9 Rep.118.

By force of the general words of their Commiſſion, they may enquire of Murther at their Seſſions; for though by *Stat.* 6 *E.* 1. *c.* 9. Dy. 67.

and 4 *E.* 3. Murthers and other Homicides must stay till Gaol Delivery; yet the *Stat.* of 18 *E.* 3. *c.*2. 34 *E.* 3. *c.* 1. 17 *R.* 2. *c.* 10. hath enlarged their Commission and Power.

Yet in respect the *Stat.* 1 & 2 *Ph. & Ma.c.* 13. directs Justices of Peace to take Examinations in Cases of Homicide and other Felonies, and to certifie them to the Justices of Gaol Delivery: In point of Discretion they do forbear to proceed to determine great Felonies.

Dalt. c.10. But for Petit Larceny, and other small Felonies, they use to bind over the Prosecutor to the Sessions.

The Justices of Peace may proceed upon Indictments taken before themselves, or former Justices of Peace: but cannot proceed upon Indictments before Coroner, or Oyer and Terminer; but Justices of Gaol Delivery may; and the Justices of Peace are to deliver the Indictments taken before them to the Justices of Gaol Delivery, by *Stat.* 4 *E.* 3. *c.*2.

By *Stat.*4 E.3. *c.*2.

They

They cannot deliver perſons ſuſpect by Proclamation, as Juſtices of Gaol Delivery may. Crom. fo. 9.

In Caſes of Felonies by *Statute* limited to be heard before Juſtices of Peace, they may proceed at Seſſions; and conſequently may bind over Informers, and certifie Examinations at Seſſions.

But ſuch *Felonies* by *Statute* as are ſpecially limited to Juſtices of Oyer and Terminer, or other Juſtices and not to them, the Juſtices of Peace cannot proceed to take Indictments, as upon *Stat.* 3 *H.* 7. *c.* 18. for contriving to deſtroy the King, &c. upon *Stat.* 33 *H.* 8. *c.* 12. Murtherers in the King's Palace; upon *Stat.* 8 *H.* 6. *c.* 12. of razing or imbezelling Records; upon *Stat.* 5 *El. c.* of Forgery; upon *Stat.* 13 *H.* 6. *c.* 1. ſecret imbezelling goods, &c. up *Stat.* 2 & 3 *Ed.* 6. *c.* 24. ſtriken in one City, and dies in another, or acceſſory in another County.

But in the former caſes it ſeems they may take the Examinations, Dal. c. 22.

and commit the Offenders, and bind over Proſecutors.

If any Indictment be taken before Juſtices of Oyer and Terminer, Gaol Delivery, or *Coroner*, they cannot proceed upon them; but upon Indictments taken before the Sheriff in his Turn, they may proceed by *Stat.* 1 *E.*4.*c.*2.

In caſes of Treaſon, Miſpriſion of Treaſon or Premunire, regularly Juſtices of Peace have no Juriſdiction; yet two things may be done:

Dal.c.90. 1. In any caſe of Treaſon, becauſe it is a breach of the Peace, they may upon complaint impriſon Offenders, take Examinations, bind Proſecutors over, and certifie their Proceedings into King's Bench or Gaol Delivery.

Dal.c.2. 2. In ſome caſes they are enabled to take Indictments, but not to hear and determine the ſame, but certifie the ſame into the King's Bench, upon *Stat.* of 5 & 23 *El.*

1. Maintainer of Authority of the See of *Rome.*
2. Obtaining Bulls, &c.

3. With-

3. Withdrawing from Allegiance.

4. Bringing in *Agnus Dei*, &c.

A perſon bringing one before a Juſtice, ſuſpect of Felony, and refuſing to be bound to proſecute, may be Committed, if it appear he can teſtifie materially.

They may Enquire of any Felony within the County, though within the Verge. 4 *R. Wigg's* Caſe.

Coroner.

Coroner.

HAth power in three Caſes: 1. To take Indictments of Death; but this he can only do *ſuper viſum corporis*, otherwiſe void. Hence,

St.PC.fo.52. 1. If the Body be interred before he come, the Townſhip amerced, and he muſt digg up the Body; ſo if the Townſhip ſuffer the Body to lie long to Putrefaction, without ſending for the Coroner: The like of one dying in Priſon.

2. If the Coroner be remiſs, and comes not being ſent for, he ſhall be fined and impriſoned.

3. He may enquire of flight, and ſuch Preſentment not Traverſable.

4. If the Body cannot be ſeen the Juſtices of the Peace may enquire thereof.

Nota,

Nota, The Record of the Coronet is of great Authority; if he Record a Confeſſion of a Felony by Approver, or a Confeſſion of breach of Priſon, or an Abjuration, it ſhall not be Traverſed.

5. *Jury dnt' Coroner acquit perſon occiſe dnt' enquire quis occidit*, 11 E. 4. 3. 14 H. 7. 2.

And it ſeems by ſome he hath power to enquire of Rape, Breach of Priſon.

He hath Juriſdiction upon Arms of the Sea, where a man may ſee from ſide to ſide.

2. Concerning *Appeals*.

The Coroner, together with the Sheriff, hath power in the County Court to receive Appeals of Robbery and other Felonies: But then it muſt be of a Felony in the ſame County: Upon this Appeal they may grant Proceſs till Utlary; but it ſeems they cannot ſend an *Exigent*, becauſe prohibited by *Stat.* of *Mag. Chart. c.* 17. St PC. fo. 52.

Such Appeal may be by Bill; and it may be removed into King's Bench by *Certiorari*, but it muſt iſſue both St. PC. fo. 64.

to

to Sheriff and Coroner, and not to Sheriff only.

It appears by *Stat.* 3 *H.* 7. *c.* 1. That an Appeal of Murther by Bill, lies before Sheriff and Coroner.

3. The Coroner alone may take the Appeal of any *Approver* of a Felony in any County.

St. P. C. f. 53. But then he cannot make Proceſs thereupon, but enter it in his Roll, and ſend it to the Juſtices of Gaol Delivery, who thereupon may iſſue their Proceſs to the Sheriff of the foreign County, to take the Appellee.

4. To take the *Abjuration* of him that acknowledges a Felony done in the ſame County, or any other.

And note, That though more Coroners than one in any County, yet any one may exerciſe any of the Powers before.

But the Preſentment of him that is firſt taken ſtands.

Sheriff.

THe Power of the Sheriff to take Indictments, was either *virtute Commiſſionis*, which is taken away by the *Stat.* 28 *E.* 3. *c.* 9.

Officii; in his Turn: wherein,

1. The *Turns* muſt be held *infra menſem Paſchæ & Michaelis*; otherwiſe the Indictments there are void *per Stat.* 31 *E.* 3. *c.* 14. St PC. f. 41.

2. The Indictments muſt be under Seal of the Jury by *Statute* of *Weſtm.* 2. *c.* 13. indented *per Stat.* 1 *E.* 3. *c.* 17. and the ſame for Lords of Franchiſes.

3. The Indictors muſt be of good Name, having 20 *s.* Freehold, or 26 *s.* 8 *d.* Copyhold; otherwiſe Sheriff puniſhable by *Stat.* 1 *R.* 3. *c.* 4.

4. The Turn can take no Indictment but of that which is Felony by Common Law, or of ſuch Matters as are particularly by Act of Parliament limited to them, and therefore

fore an Indictment of Rape void there.

5. Upon any Indictment of Felony before the Sheriff in his Turn, they can make out no Proceſs, but muſt ſend them to the Juſtices of Peace, who have power to proceed thereupon as if taken before themſelves, by *Stat.* 1 *E* 4. *c.* 2.

Court-Leet.

THe *Court-Leet* hath in effect the ſame Juriſdiction with the Turn; but Preſentments of Felony before them are to be ſent before Juſtices of Gaol Delivery. 3 *H.*4.18.

The

The means of bringing Capital Offenders to Trial.

HAving considered the Courts of Justice, now we come to consider the means of bringing Capital Offenders to their Trial; and that is Regularly by one of these three ways;

Appeal.
Approver.
Indictment.

And herein some things are proper to each proceeding.

§. Some things are common to them all, which come to be considered after Particulars, proper to either, dispatched, *viz.*

Process.

Arraignment; and therein of Principal and Accessory.

Demeanour of the Party Arraigned;

Standing

Standing Mute.
Confeſſing.
Pleading and Pleas.

Declinatory,
Sanctuary.
Clergy.

In Bar,
Pardon.
Auterfoits Acquit.
Auterfoits Convict.

To the Felony,
Trial.
By Battel.
By Jury, and therein
Proceſs againſt the
Jury.
Challenge.
Evidence.
Verdict.
By Peers, in caſe of
Nobility.

Judgment in the ſeveral Caſes Capital.

Execution.
Reprieve.
Falſifier.
By Error.
By Plea.

Appeal.

Appeal.

Appeals in reſpect of the *manner* of proceeding, are of two kinds

1. By Writ.
2. By Bill.

Touching Appeals *by Bill*, they may be proſecuted.

1. In the King's Bench againſt any that is *in cuſtodia Mareſcalli*, or let to bail: they are the Sovereign Coroners.

2. In the Court before Commiſſioners of Gaol Delivery againſt a Priſoner, or one let to bail, but not, of one let to Mainprize.

But if one of the Appellees abſent, remove in *B.R.* by *Certiorari*.

3. By ſome other Juſtices of Peace, *quod Quære* 44 *E.* 3. *Coron* 95.

4. Before Sheriff and Coroner, as before; and it may be removed by *Certiorari* in *B.R.* 3 *H.*7. *c.* 1.

5. Before the Conſtable and Marſhal, of a Felony done out of the Realm, 1 *H.*4.*c.*14.

In relation to the *Matter.*

Appeals are in Matter,

1. *Not Capital*, as an Appeal of Maihem, which may be commenced in King's Bench, Gaol Delivery, or before Coroner and Sheriff.

This, though it be *felonice*, yet is but a Treſpaſs in its Nature and Judgment.

2. *Capital*; and that either,
   1. Of *Treaſon*; but this ouſted *by Stat.* 1 *H.*4.*c.*14.
   2. Of *Felony*; and theſe of three kinds:
      1. Of Death.
      2. Of Larceny.
      3. Of Rape.

Appeal of Death.

AN Appeal *of Death* is either by the Wife or Heir.

1. Appeal of Death *by the Wife*; and therein theſe *requiſite:*

1. She ought to be a Wife *de jure*, and not *de facto* only; and therefore *ne unque accouple* a good Plea.
2. But ſhe need not be dowable; for if ſhe had Eloped, or the Husband been Attaint; yet ſhe may have an Appeal of his death.
3. She ought to continue his Widow; for if ſhe marry before, or pending the Appeal, the Appeal fails for ever; or if ſhe marry after Judgment, ſhe cannot have Execution.

2. Appeal of Death *by the Heir.*

1. If the dead hath a Wife, the Heir ſhall not have Appeal though ſhe die within the year: But if the Wife

kill the Husband, there the Heir ſhall have an Appeal.

2. He muſt be Heir by courſe of Common Law; this hath theſe Exceptions:

1. Where Heir is diſabled by Attainder.

2. Where the Appeal is againſt the Heir; in theſe caſes it goes to the next Heir, as if the other were dead without Iſſue.

3. It muſt be by Heir that was Heir at time of death of Anceſtor; for if he die within the year before, or after Appeal commenced, it is loſt.

But it ſeems, if the Heir having Judgment die, his Heir may have Execution.

4. It muſt be an Heir and Male; *Nullus capiatur propr' Appellum fœminæ alterius quam viri ſui:* But if he be Heir, and Male, though he derive through Females,

Females, he may have an Appeal. C. Lit.

5. A man above Seventy, or an Infant, may have Appeal; but no Battel waged, and adjudged of late times the Parol ſhall not Demur. *Sed Quære.*

But an Idiot, Monk, or Man mute, ſhall have no Appeal, neither of death, nor otherwiſe.

And Note, the Appeal of death muſt be within year and day after death by *Stat.* 3 *E.* 6. *c.*24. ſtriken in one County, and dies in another; or Acceſſory in one County, to death in another: Appeal brought where party died. C.PC 53.

Appeal of Robbery.

Servant robbed, Maſter or Servant may have Appeal.

But Teſtator robbed, Executors ſhall not have Appeal.

Villain ſhall not have Appeal of Robbery againſt his Lord; *contra* of Death.

Two joint Owners robbed, Survivor ſhall have Appeal.

A Woman or Infant ſhall have an Appeal of Robbery.

If a man be robbed at ſeveral times, he muſt put all into one Appeal.

What omitted is Confiſcate.

The Appeal affirms the continuation of the property. Therefore if *A.* rob *B.* in the County of *S.* and go with the Goods into the County of *D.* an Appeal of Larceny lies in the County of *D.* but not of Robbery, for that is upon a taking from the perſon.

If *A.* be robbed by *B.* who is robbed by *C.* *A.* may have an Appeal of Larceny againſt *C.*

This

This Appeal may be proſecuted in a year, two, or three, if there was freſh Suit; and the judging of freſh Suit lies in the diſcretion of the Court.

And Note, This, or any other Appeal lies againſt an Infant, againſt a Monk, without naming his Sovereign, againſt a Feme covert without naming her Husband.

Appeal of Rape.

Appeal of Rape.

1. Lies for the party raviſhed.

2. But if ſhe conſented to the Rape afterwards, then by *Stat.6 R. 2. c.* it is given to the Husband; if none, to the Father; if none, to the Heir, whether Male or Female.

If ſhe be taken in one County, and raviſhed in another, the Appeal of Rape lies in that County where actually raviſhed.

Although by *Stat. W.* 1. *c.* 13. whereby Rape was turned into Treſpaſs, forty days is limited for her Suit; yet it being again made Felony by *Stat. W.* 2. *c.* and no time limited for it, it may be brought in any reaſonable time.

Proceſs

Proceſs in Appeal.

Concerning Proceſs in Appeals, *vi. infra* Proceſs in general, becauſe many things therein common to Appeals and Indictments.

The *Count* in an Appeal.

1. The Plaintiff in his Appeal muſt mention the place and day; need not mention the hour; and though day be miſtaken, not material upon Evidence.

2. It ſufficeth for Plaintiff to count againſt Defendant, according to the conſtruction that the Law maketh upon the Fact.

If *A. B.* and *C.* preſent, and *B.* only ſtrike the mortal ſtroke, he may count againſt them all, that they ſtrook: So in Rape.

3. An Appeal by Heir ought to ſhew *Coment.*

4. In Appeal of Rape, *felonice rapuit* ſufficient, without ſaying *carnaliter cognovit, vid.* 11 *H.* 4. 1.

5. In

5. In Appeal againſt *A.B.* and *C.A.* only appears, he muſt count againſt all by the better Opinion.

6. At this day but one Appeal againſt all Principals and Acceſſories, and if an Appeal be againſt *A.* and he is attaint or acquit, or Plaintiff non-ſuit, he cannot have another Appeal againſt *B.* But if Acceſſory in one County to Felony in another, there ſeveral Appeals againſt Principal and Acceſſories.

Pleas

Pleas to the Writ and in Bar.

Writ of Appeal abate,

1. For inſufficiency in the Writ, as wanting *rapuit*, falſe Latin, &c.

2. Multiplicity of Action; a ſecond Writ of Appeal purchaſed, pending a former Writ abates; but if pending a former in the County abates not.

But if the firſt Appeal by Bill be removed into the Bench by *Certiorari*, and the Plaintiff had appeared thereupon, and counted, abates the ſecond Writ.

Nul tiel in rerum natura, as one of the Defendants, abates *vers touts*, &c.

Pleas

Pleas in Bar.

Vid. infra in ceo general Title, as to *Autrefoits Convict or Acquit.*

C.PC. 98. 1. He may plead any thing whereby it appears the Plaintiff is not intituled to the Appeal, *de quo v. ſupra.*

2. Nonſuit in a former Appeal after Declaration, ſo of a *Retraxit.*

3. The Plaintiff brought an Appeal of the ſame Felony againſt another, who was acquit or attaint at his Suit.

4. Plaintiff hath releaſed to Defendant; but if Appeal againſt Divorce, a Releaſe or *Retraxit* as to one, no bar for the other.

5. If Defendant plead in Bar, he may alſo plead over to the Felony, and it ſhall not be double.

1. But in caſe of a Releaſe pleaded, he ſhall not plead over to the Felony, becauſe repugnant.

2. In

2. In caſe of Villenage pleaded he ſhall not plead to the Felony, becauſe Infranchiſement; yet if that bar found againſt him, he may plead Not Guilty; and ſo in any other caſe where he pleads in bar without pleading over, except Releaſe.

Approver.

Approver.

C.PC.c.65. S.PC. f.142.

1. WHat it is to be an Approver?

A perſon indicted of Treaſon or Felony not diſabled to accuſe before competent Judges, confeſſing the Indictment, and ſworn to reveal all Treaſons and Felonies he knows, and then before a Coroner entring his Appeal againſt *participes Criminis* in the Indictment within the Realm.

2. Who may be an Approver, and who not?

1. A Peer of the Realm cannot be an Approver.
2. A perſon Attaint cannot be an Approver; nor a perſon out of Priſon, though indicted.
3. A Woman, Infant, Idiot, *Non compos*, Clerk, cannot be Approver.
4. But a Man above ſeventy, or maimed may, but he ſhall not wage Battel.

5. Clerk

5. Clerk Convict may.

3. In what caſes?

1. None can approve but an indicted; and therefore if only in Priſon upon ſuſpicion, he may indeed confeſs the Felony, but ſuch Confeſſion amounteth not to an Attainder or Conviction, though it be an Evidence, and therefore cannot approve.

2. The Appellee in Appeal cannot be an Approver.

3. Appellee of Approver cannot be Approver, for that would be infinite.

4. Though a perſon Indicted approve, yet if after an Appeal be againſt him, the Approvement ceaſeth.

5. He that hath once pleaded to the Felony cannot be Approver, but ſhall be hanged, for he is found falſe.

4. Of what Offences?

It must be only of the Offences contained in the Indictment, be it Felony or Treason, and therefore not of another Offence, nor of an Accessory before or after to the same Offence; yet his Oath general, therefore as to other Offences, it is but a Detection, not an approvement.

5. Before whom?

Before such Judges only as can assign a Coroner, as King's Bench, Gaol Delivery, Oyer and Terminer, High Steward; but not before Justices of Peace, Court Baron, or County Court.

But it is in the discretion of the Court either to suffer him to be Approver, or to respit Judgment and Execution, till he hath Convicted all his Partners.

6. How Demesned after Appeal?

1. After Felony confessed upon the Arraignment, a Coroner assigned and sworn in Court to discover Offenders.

2. A

2. A day prefix'd, within which he is to perfect his Appeal before the Coroner, and in every of thoſe days he muſt Appeal; for if he fail in any, and the Coroner record it, he is to be hanged.

The time limited to perfect his Appeal by 5 *E.* 2. *c.* 34. is three days, but that Repealed 15 *E.* 2.

3. During the time limited for his Appeal, he ſhall be at large, and have 1 *d. per diem* till his Appeal finiſhed.

4. If he Appeal perſons beyond Sea, or ſuch as are not in *rerum natura*, and that appear by Teſtimony of Country, or by Return of Sheriff *quod non fuit invent'*, he ſhall be hanged.

5. After his Appeal formed before the Coroner, he muſt repeat it *verbatim* before the Court; and if he fail

thereof, and the Coroner Record it, he ſhall be hanged.

7. *Proceſs* in Appeal.

1. In the ſame County the Coroner may award Proceſs to the Sheriff, till Exigent.

2. If Appellee be in a foreign County, then the Judges before whom the Appeal is, may grant Proceſs, *viz.B.R.* or *Itinerant* by Common Law; and by *Statute* of 28 *Ed.* 1. *de Appellatis*, the Juſtices of Gaol Delivery may ſend Proceſs into a Foreign County, as well to apprehend the Appellee, as a *Venire facias* to try the Iſſue.

S.P.C.f.146.

8. *Proceeding* upon *Trial.*

The Appellee may put himſelf upon the Country, or wage Battel.

If five Appellees, and they wage Battel, he muſt fight them all.

If two Approvers againſt one Appellee, if the Appellee vanquiſh the firſt, he is acquitted againſt the reſt: though

though Appellor retract his Appeal, or be vanquiſhed; yet if the Offence be within Clergy, he ſhall have it; and ſo of the Appellee.

9. Proceeding after Trial.

If the Appellor convict the Appellee, either by Battel or Verdict, the King *ex merito juſtitiæ* is to pardon him; and from the time of his Appeal till his Pardon or Conviction, ought to have wages.

Indictments.

THeſe things conſiderable;

1. Where an Indictment requiſite in caſes Capital, and where not.

2. What the quality of Indictors.

3. Of what Matters they may Enquire.

4. Before whom found.

5. What requiſite in the manner of them.

1. Where an Indictment requiſite for a party to be Arraigned at the King's Suit.

1. By the Ancient Law, if a man was taken in Larceny with the manner, and that brought into Court with the Priſoner, the Priſoner ſhould be Arraigned thereupon without any Indictment. *Stat. P.C. f.*148.

And ſuch was the uſe of thoſe Manors that had Infangthef. *Ibid. f.*29. *Vid.* 1 *E.* 3. 17. 17 *Aſſ.* 49. but this diſuſed.

2. If

2 If Treſpaſs be brought *de mu-* S.PC.f.94.
liere abducta cum bonis viri, and the Defendant found Guilty: Or if in Treſpaſs for Goods the Defendant be found that he ſtole them; this in the King's Bench equivalent to an Indictment, and the Defendant put to anſwer to the Felony.

3. In ſome Caſes upon Appeals, by Appellors or Approvers not proſecuting, &c. the Defendant arraigned at the King's Suit; becauſe it carries a preſumption of Truth; and therefore if the Defendant be both Appealed and Indicted upon a Non-proſecution of the Appeal, the party ſhall be arraigned upon the Appeal, not the Indictment. 4 *E.* 4. 10.

Wherein,

1. If the Plaintiff in Appeal by S.PC. f.148.
Writ be Nonſuit before Declaration, he ſhall not be arraigned at the King's Suit. 1. Becauſe no certainty. 2. The Writ may be at anothers Suit, but if it be by Bill either by Appellor or Approver, it ſeems he ſhall, becauſe the certainty appears; therefore in the former

Caſe, if there be no Indictment againſt him, he is diſmiſſed.

2. If the Plaintiff releaſe his Appeal after he hath commenced it, the party ſhall be arraigned at King's Suit: But if before it was commenced, then not; becauſe it was never well commenced.

3. If the Plaintiff or Approver, after Appeal commenced, confeſs it falſe, or take to his Clergy, or wave his Appeal, yet arraigned at the Suit of the King: But if the Approver after Battel joyned do in the field confeſs it falſe, the Appellor hang'd, and the Appellee diſcharged, becauſe amounts to a vanquiſhment.

4. If the Appeal abate by Act of the Plaintiff, as taking Husband; or act in Law, as death; Appellee arrainged at the King's Suit: But if it abate by inſufficiency in the Appeal, as by falſe Latin, Miſnoſmer, or becauſe Plaintiff diſabled to commence Appeal, as Utlary of Felony, or Treſpaſs; or the year and day paſt; or Plaintiff not Wife or Heir; Defendant, not arraigned upon Appeal, but may be Indicted.

2. If

5. If the King pardon after Battel joyned in Appeal by Approver, no Arraignment at King's Suit, but Appellee discharged.

And Note, where the Prisoner arraigned upon the Appeal, a *Cesset Processus* entred upon the Indictment. St.PC.104.

The Retorn of the Sheriff of Rescue or Escape of a Felon, not sufficient to put the party to answer the Felony. S. PC.

2. The second thing considerable, is the quality of *the Indictor.*

Concerning Indictments in Leets and Turns, *vide ante* upon *Stat. W.*2.*c.*13. 1 *E* 3.*c.*17. 1 *R.*3.*c.*4. 1 *E.*4. *c.* 3.

There is a General *Statute* that refers to all Indictors, as well in case of Felony as Treason, 11 *H.*4. *c.* 9. which requires, St.PC. f. 33.

1. Indictors not to be,
   1. Persons fled to Sanctuary for Felony or Treason.
   2. Not Outlawed.
   3. Not Indicted or Attainted.
   4. Not by Conspiracy.

2. That

2. That the Indictors be the King's Liege People.

3. Returned by the Sheriff, or Bailiffs of Franchiſes.

4. Not at the nomination of any perſon.

And all Indictments taken contrary void.

Hence it follows:

1. That the Priſoner upon his Arraignment may plead this matter, or any Point of the *Statute*, and may plead over to the Felony. *Vide Scarlet's* Caſe.

2. Though there be twenty of the Grand Jury, yet if one was outlawed or taken at the nomination of another, it avoids the whole Indictment.

By *Stat.* 3 *H.* 8. *c.* 12. Juſtices of Gaol Delivery, or of Peace, whereof one of the *Quorum*, in open Seſſions, may reform the Panel of the Grand Jury, by putting in and taking out Names, and the Sheriff is to return the Pannel ſo reformed.

But this takes not away the former *Statute* of 11 *H.* 4 nor alters it.

By

By *Stat.* 33 *H.* 6. *c.* 2.

Special proviſion is made for the quality of the Indictors in *Lancaſhire.*

3. Of which things they can Enquire.

Regularly they can Enquire of nothing but what ariſeth within the Body of the County, for which they are retorned.

And therefore if an Indictment for Scandalous Words, or other matter tranſitory be found upon Not Guilty pleaded thereunto, if upon Evidence it appear to be ſpoken in another County, the Defendant is not guilty.

And therefore where Stroke was in one County, and Death in another, he could not be Indicted where party died.

But for a Nuſance in one County to another, a Jury of the County where Nuſance is committed may Indict it.

But divers *Statutes* have Introduced an alteration of the Law in ſome Capital Caſes, 28 *H.* 8. *c.* 15. Trea-

Treaſons, Felonies, Robberies, Murthers and Confederacies upon the Sea may be enquired. tried, heard, determined, and judged in ſuch Shires and places as ſhall be limited by the King's Commiſſion to be directed for the ſame.

A Treaſon done out of the Land, it hath been held that it may be enquired of and tried where the Offender had Lands; but to avoid the Queſtion by *Stat.* 35 *H.*8. *c.* 2. all Treaſons and Miſpriſions, or concealments of Treaſons done out of *England*, may be enquired, heard, and determined by the Juſtices of the King's Bench, by perſons of the County where the Bench ſits, or before Commiſſioners, and in ſuch Shires as ſhall be appointed by the King's Commiſſion, by good men of the ſame Shire, as if the Treaſons,&c. had been done in the ſame Shire where inquired.

Upon this *Statute.*

St.PC.f.71. 1. If the Bench remove after Indictment into another County, the Trial ſhall be by perſons of the firſt County. 2. The

2. The King's writing his Name to the Commiſſion, or putting his Signature to the Warrant, ſufficient.

3. *Ireland* is out of the Realm to this purpoſe.

Theſe *Statutes* ſtand unrepealed by *Stat.* of 1 *Ma.c.* but the *Stat.* of 32 *H.*8. *c.*4. for trial of Treaſon in *Wales*, repealed by 1 *Ma.* C.PC. f.24.

Again, by *Stat.* 2 & 3 *El. c.* 24. a man ſtricken in the County of *D.* dies in the County of *S.* or Acceſſory in one County to Felony in another County, may be indicted and tried in the County where the death was, or Felony committed by the Principal; but it muſt be laid according to truth. C.PC. 49.

If Inqueſt conceal any matter preſentable before Juſtice of Peace, they may impannel Inqueſt to enquire of ſuch Concealments, and amerce the Concealers, by *Stat.* 3 *H.* 7.*c.*1.

4. Before whom found.

Of this before.

5. The

5. The form of Indictments.

St. PC. 1. By *Statutes:*

4 *H.*4 c.2. *Inſidiatores viarum & depopulatores agrorum*, to be omitted in Indictments; and if inſerted, yet Clergy not thereby taken away.

37 *H.* 8. *c.* 8. Indictment not to be quaſhed for want of the words, *viz. gladiis, baculis, & cultellis.*

2. At Common Law:

1. Want of certainty vitiates; want of year, day and place.

Indictment for Eſcape of one taken on ſuſpicion of Felony, without ſhewing what Felony, *Male.*

Indictment for receipt of a Felon, without ſhewing who received, *Male.*

Indictment *ad magnam Curiam & Letam, Male.*

Indictment for making Alchimy *ad inſtar pecuniæ Regis*, without ſhewing what Mony, *Male.*

Indictment *quod communis Malefactor*, without ſhewing wherein, *Male.*

Indictment *quod cepit*, or *furatus eſt*,

eſt, without ſaying *felonice*; *abduxit equum*, without ſaying *cepit*; or *carnaliter cognovit*, without ſaying *Rapuit*; or *burgariter*, when it ſhould be *Burglariter*; or if Felony before Juſtice of Peace, without ſaying *necnon ad diverſas felonias, &c.* or before the Mayor of *London* without ſaying *& Coronatore*; or of a Murther with a Gun, without ſaying *percuſſit, Male.*

Indictment ſuppoſing the Stroak, 1 *Auguſti*, death 2 *Auguſti*, *& ſic felonice murdravit* 1 *Auguſti*, *Male.* But *ſic murdravit modo & forma præd'*, or *præd'* 2 *Auguſti*, *Bene.*

Indictment, *quod dedit mortalem plagam circa pectus*, *Male:* But, *in ſiniſtra parte ventris circa umbelicum*, *Bene.*

Indictment *de morte cujuſdam ignoti*, or *felonice cepit bona, &c. cujuſdam ignoti*, or *domus & Eccleſiæ*, in time of Vacation, good.

Indictment of Poyſoning with ſeveral ſorts of Poyſon, without ſhewing of which he died: good. C. PC. c. 62.

6. *Proof*

6. *Proof upon Indictments.*

In caſe of Treaſon and Miſpriſion by the *Stat.* 1 *E.* 6. *c.* 12. & 5 *E.* 6. *c.* 11. there ought to be two lawful Accuſers, that is, Witneſſes upon every Indictment.

C.PC.24. An Accuſer by hearſay, is no lawful Accuſer within this *Statute.*

The neceſſity of ſuch Proof upon Indictment of Treaſon, is not taken away by *Stat.* 1 *E.* 1, 2, 1 & 2 *Ph.* & *Ma.c.* 11. but only in the caſe of counterfeiting Coin.

St.PC.164. But theſe Witneſſes need not be preſent with the Indictors, but they may ſend it to them in writing.

Proceſs

Proceſs.

NOw we come to thoſe Proceedings that for the moſt part are common both to Appeals and Indictments. And,

1. Of *Proceſs.*

1. Upon an Indictment or Appeal *of Death* but one *Capias*, and then *Exigent:* but in caſe of Robbery, then by *Stat.* 25 *E.* 3. *c.* 14. two *Capias*'s, then *Exigent*; but this *Stat.* extends not to death.

2. But Indictments or Appeals of Treaſon, or any Felony, or Treſpaſs *againſt a perſon of another County* after one *Cap'* a ſecond *Cap'* with Proclamations, ſhall be granted to the Sheriff of that County wherein he is ſuppoſed to be converſant before an *Exigent* ſhall iſſue by *Stat.* 8 *H.* 6. *c.* 10. And

upon this *Statute* Proceſs ſhall go to a County Palatine; and if in the Indictment he be ſtyled *nuper de D.* and ſo in ſeveral Counties, the ſecond *Cap'* ſhall go to every County.

S.PC. f.67. 3. In Appeal or Indictment *againſt Principal and Acceſſory*, by *Stat. W.* 1. *c.* 14. Proceſs of Utlary muſt ſtay againſt Acceſſory till Principal attaint.

But if it be an Appeal *by Writ* which is general till Declaration, the Plaintiff muſt at his peril diſtinguiſh the Proceſs; for if he take his *Exigent* againſt all, he muſt Count againſt all as Principals.

An Appeal *againſt divers*, one appears and pleads to the Writ, or in Bar, which goes to all, Proceſs of Utlary ſhall ſtay againſt the reſt till Plea determined.

An

An Indictment or Appeal may be *removed* in *B. R.* by *Certiorari*, but it muſt accord with the Appeal.

Upon an Appeal removed by *Certiorari*, the Plaintiff is without day; and to compel the Plaintiff to proceed, the Defendant may take out a *Scire facias*, and upon two *Nihils* or a *Scire feci*, and default, Defendant diſcharged.

But the Plaintiff upon ſuch Appeal removed, may have *Capias & Exigent.*

If the Defendant comes in by *Capias*, and after appearance make default, a new *Capias*; if upon *Exigent*, a new *Exigent*; and upon ſecond appearance ſhall plead *de novo*, for the firſt Iſſue and Inqueſt is *ſine die.*

Arraignment.

1. IN what *manner* a Perſon is to be Arraigned?

The Priſoner, at the time of his Arraignment ought not to be in Irons.

St. PC. f. 66. 2. Where arraigned *upon ſeveral Appeals or Indictments.*

If a man be indicted or appealed of Robbery or Death at the Suit of one, he ſhall be arraigned and tried at the Suit of another, becauſe they have ſeveral intereſts in the Judgments.

And now the ſame Law is of an Indictment of Robbery, becauſe by *Stat.* 21 *H.* 8. *c.* 11. the party is to have Reſtitution.

But if the Appeal by one be not commenced till after an Attainder at the Suit of another, he ſhall not be arraigned upon the other Suit:

But if the firſt Attainder be pardoned, he ſhall be arraigned upon the

the ſecond Appeal commenced after the Attainder.

But after an Attainder of Felony, he may be arraigned for Treaſon for the King's Intereſt.

By the Common Law, a Clerk convict ſhould have anſwered all Felonies, and were acquit or convict at the Suit of others.

But this was remedied by *Stat.* 25 *E.*3. *c.*4. *pro Clero.* And therefore after that *Statute*, the Clerk convict and delivered to the Ordinary, was diſcharged of all former Felonies whereof he was not arraigned before Clergy; and that although thoſe other Offences were not within Clergy. *Dyer* 214.

But now by *Stat.* 8 *El. c.* 4. after Purgation, and 18 *El.c.*7. after burning in the Hand, he ſhall be put to anſwer former Felonies upon Appeal or Indictment. *Vid. infra in auterfoits acquit & convict.*

3. Concerning the *Arraignment of Principal and Acceſſory.*

1. Who ſhall be ſaid an Acceſſory
   Before,
   After.
2. How the Proceeding ſhall be againſt them upon their Arraignment.

Prin-

Principal and Acceſſory.

1. WHo an *Acceſſory?*

1. In Treaſon no Acceſſories, but all Principals: But a Procurer before, or a Receiver knowingly after, is guilty as Principal in High Treaſon. C.PC. f.138.

2. Where an Act of Parliament makes a Felony, it doth incidently make ſuch Acceſſories as would be Acceſſories before or after to a Felony at Common Law; as in caſe of Buggery, Rape, &c. C. PC. f. 59.

3. The Acceſſory cannot be guilty of Petit Treaſon, where the Principal is but Murther.

4. If divers come to commit an unlawful act, and be preſent at the time of Felony committed, though one of them only doth it, they are all Principals.

So if one preſent move the other to ſtrike: Or if one preſent did nothing, but yet came to aſſiſt party if need: Or if one hold the party while the Felon ſtrikes him: Or if one preſent deliver his Weapon to the other that ſtrikes; for they are *præſentes*, *auxiliantes*, *abettantes*, or *confortantes*.

S.P.C.f.40. But if one came caſually, not of the Confederacy, though he hindered not the Felony, he is neither Principal nor Acceſſory, although he apprehend not the Felon.

5. In ſome cales a perſon *abſent* may be Principal.

4 Rep. 44. *Vaux*'s caſe. C.P.C.138. 1. He that puts Poiſon into any thing to poiſon another, and leaves it, though not preſent when taken: And ſo it ſeems are all that are preſent when the Poiſon is ſo infuſed, and conſenting thereto.

2. If upon the ſame Ground, or in the ſame Houſe, though not within view of the Fact, when many come

come to do an unlawful act: See before Lord *Dacre*'s Case, and *Pudsey*'s Case in Murther and Robbery.

3. By special Act of Parliament, as upon the *Stat.* 3 *H.* 7. *c.* 2. 8 *H.* 6. 12.

2. Accessories *before*; he that commandeth or assenteth to the committing of a Felony, and is absent when done.

1. In Manslaughter there can be no Accessory before, because done without premeditation. 4 Rep. *Bibith's* case.

2. Where the Execution varies from the Command in the person slain; as a Command to kill *A.* and he kill *B.* or in the nature of the Offence; as Command to rob *A.* as he goes to Market, and he break open his House and robs it, the Commander is not Accessory. C. P. C. f. 57.

3. But a Command to poison *J. S.* and he shoots him; a Command to rob or beat *J. S.* and he beats him to death, the Commander Accessory.

4. If *A.* Command *B.* to kill *C.* and before the Fact *A.* repents, and count-

countermands his Command, yet *B.* kills him, *A.* is not Accessory.

5. If *A.* poison an Apple, and deliver it to *C.* to deliver to *D.* *C.* not knowing delivers it, Murther in *A.* but no Offence in *C.*

3. Accessory *after.*

St.PC.41. 1. A Receipt of stolen Goods makes not Accessory, unless he receive Thief. *Ou recieve le biens a auter Felon,* 9 H.4.1.

2. Every Receipt to make an Accessory, must be knowing him to be such.

But if a man be attaint of Felony in the County of *A.* the Law presumes Notice thereof in the same County: Therefore the Receipt of him in the same County seems Accessory; *Contra,* if in another County. *Videtur cognitio requisita in utroque.*

3. Receit of a Felon, that hath given Bond to appear at Sessions,&c. not Accessory.

4. Relieving a Felon with Mony, Victuals, Horse for his Journey, know-

knowing Acceſſory: But if he be in Priſon, then lawful. *Dal c.* 108.

5. A Brother receiving his Brother may be Acceſſory, or a Huſband his Wife, but not the Wife of her Husband.

6. A man may be Acceſſory to an Acceſſory: And

The ſame man may be Principal and Acceſſory where Felony done by divers.

7. But ſending a Letter in favour of a Felon, inſtructing him to read, adviſing to labour Witneſſes not to appear, not revealing a Felony intended, permitting a Felon to eſcape without arreſt, makes no Acceſſory: *Mes Contempt.*

8. Acceſſory cannot be unleſs a Felony committed; therefore *A.* wounds *B.* dangerouſly, *C.* receives *A.* then *B.* dies, *C.* is not Acceſſory.

9. *Si Felon vient al meaſon* J. S. *que ſuffer luy d'aler hors, n'eſt Felony, niſi priſt Mony ou autre choſe pur luy ſuffer Eſcape.* 9 H. 4. 1.

Arraign-

Arraignment of the Principal and Acceſſory, and things Obſervable therein.

1. IF the Principal be acquitted, or be convict only of Manſlaughter, or *Se defendendo*, or before Attainder hath his Clergy, or be pardoned, or die, the Acceſſory ſhall not be arraigned; otherwiſe if after Attainder. S.PC. 47. C. PC. 139. 4 R. *Styr's* caſe.

2. If the Principal be attaint at the Suit of the King, the Acceſſory ſhall not be arraigned at the Suit of the party. *Iſſint ſi ſoit attaint d'auter Felony.* S.PC. 47.

3. If Principal ſtand mute, Acceſſory not Arraigned. *Vid. Contra* 2 *R.* 3. 22. 3 *H.* 7. 1.

4. The *Exigent* ſhall not go out againſt Acceſſory till Principal attaint by *Stat. W.* 1 *c.* 14. S.PC. 48.

5. Where

5. Where Principal appears not, Acceſſory ſhall be put to anſwer; but he ſhall not be tried till Principal attaint or appear, unleſs he will, for he may wave the benefit of the Law.

St. PC. 47. 6. If he be indicted as Acceſſory to two, and one of the Principals appears and is convict, the Court may, if they pleaſe, try the Acceſſory; and if he be found Acceſſory to him that is attaint he ſhall be Condemned; if not found Acceſſory to him, yet he may after be Arraigned as Acceſſory to the other when he appears.

Com. 100. Gittin's caſe.

C. Weſt. 1. 6. 14. 7. If Principal and Acceſſory appear and plead to the Felony, they may be tried by the ſame Inqueſt; but the Principal muſt be firſt Convict, and have Judgment, before Judgment againſt Acceſſory, and the Jury ſhall be [Charged] that if they find Principal not guilty, they ſhall find the Acceſſory not guilty.

8. If Principal be Erroneouſly attainted, yet Acceſſory ſhall not take

take advantage thereof, but be Arraigned.

9. If Murther or other Offence were in one County, and Acceſſory in another, by *Stat.* 2 *E.* 6. *c.* 24.

1. If Acceſſory be in *Middleſex*, where the King's Bench ſits, and Principal in another County, the King's Bench may try the Acceſſory. C. PC. p. 49.

2. Certificate in ſuch caſe ſhall be upon a *Certiorari* or Special Writ, if need be, formed upon the Matter, and not by Precept, under their Seals, in their own Names. Ibid.

3. The High Steward is within the Act.

Acceſſory al Petit Larceny, 3 Cr. 750. *nemy al Homicide per infortun'*, 15 E. 3. Coron. 116.

Novel Felony fait per Stat. videtur nul Acceſſory niſi ſpecialment enact que, Vid Dy. 88. Stam 44.

Vid. pur Trial d' Acceſſory in foreign County. 2 E. 6. cap. 24. Dy. 253.

Acquit

Acquit come Principal nemy arrain come Acceſſory: Mes acquit come Acceſſory arrain come Principal.

Mute

Mute, Paine fort & dure.

V. Stat. Weſt. 1. cap. 12. & eſtre inquiry de offence dnt' *Paine fort & dure.*

NOw we come *to the Demeanor of the Priſoner* upon his appearance:

And thereupon either,

1. He ſtands Mute.
2. He pleads.
3. Or he confeſſeth the Fact.

1. What ſaid a *ſtanding Mute?*

This of two kinds:

1. When he anſwers nothing at all: and then it ſhall be enquired, whether he ſtand Mute by malice or by the act of God. West 1. c. 12. St. P.C. f. 150.

If it be by the act of God, then the Felony ſhall be enquired of, and whether he be the ſame perſon, as if he had pleaded not guilty.

If by Malice, or if the Priſoner hath cut out his own Tongue, then he ſhall have Penance.

Nota, *Si ad unfoits pled' al Felony*

 licet

licet apres eſtoit Mute, ſer' trie, 15 E. 4. 33.

Viez Pere eſtoit Mute aver' Penance, 7 *Car.* Lord *Caſtlehaven's* Caſe.

2. When he pleads, but not effectually; as when he anſwers not directly to the Fact, or concludes not upon the County, then if the cauſe be probable, he ſhall be put to his Penance. *C.PC.p.*227.

Nota, Si Chall' ultra 35. Standing Mute. *Vid.C.PC.fo.*227.

2. What *the Conſequent* of ſtanding Mute? 1. *Forfeit biens*, 14 E. 4. 7.

1. In Treaſon it is a Conviction.

2. After Attainder and ask'd what he can ſay why no Execution, ſtanding Mute he ſhall be Executed.

3. In Appeal ſtanding Mute, Judgment againſt him to be hanged. *Contra*, 14 *E.*4.1.

4. Upon *Stat.* 33 *H.* 8. *c.* 2. of Felony within the Verge, Offender ſtanding Mute, Judgment againſt him.

5. But

5. But in other caſes of Felony, *Paine fort & dure*, and forfeits Goods.

1. Remanded to Priſon.

2. Lie naked in ſome dark Room, with Hands and Legs extended.

3. Weights increaſed.

Pleas.

IF the Priſoner plead, it is either,
1. Declinatory.
Sanctuary.
Clergy.
2. Or to the Felony:
1. Demurring.
2. Pleading in Bar.
3. Pleading the General Iſſue.

Declinatory Exceptions.

1. *Sanctuary* and the Conſequents, *Abjuration* ouſted by *Stat.* 21 *Jac.* c. 28.

Clergy.

Clergy.

2. *Clergy*, wherein
   1. Who ſhall have benefit of Clergy?
   2. In what Caſes?
   3. At what time?
   4. Who the Judge?
   5. What the Conſequent?

1. *Who* ſhall have Clergy, and who not?
   1. A Blind man ſhall not have his Clergy. *Nec* Jew, *nec* Turk: *Contr' de* Greek *ou home excommeng'*.
   2. A Woman cannot have the benefit of Clergy.
   Proviſion by *Stat.* 21 *Jac. c.* 6. C. PC. c. 124. that for ſtealing Goods under 10 *s.* without Burglary or Robbery, &c. ſhall be Burnt in the Hand for the firſt Offence.
   3. Bigamy ouſted of Clergy by *Stat. de Bigamis* 4 *E* 1. but reſtored to it by *Stat.* 1 *E* 6. *c.* 12.

Ceſtuy que abjure aver' Clergy apres ſon returne, 8 H. 8. Kel. 186.

Ceſtuy que ad unfoits Clergy n'aver' auterfoits, niſi deins Orders, 4 H. 7. c. 17.

2. *In what caſes?* Some things premiſed in general.

1. By *Stat.* 25 *E.* 3. *c.* 4. *pro Clero*. Clergy allowed in all Treaſons or Felonies, except Treaſon againſt the King; ſo that after that *Statute*, there was Clergy in all Caſes, but

{ Treaſon,
{ Sacrilege.

2. Conſequently whereſoever Clergy is not allowable in any other caſes, it is taken away by ſome Act of Parliament.

3. Conſequently where any Felony is made by a new *Stat.* Clergy is to be allowed, unleſs expreſly taken away.

4. Con-

4. Conſequently where by any ſpecial Act of Parliament Clergy is taken away in any Offence, the Indictment ought to bring the Caſe within the *Statute*. As upon the *Stat.* 3 & 4 *Ph.* & *Ma. c.* 4. the Indictment muſt run *Malitioſe*; ſo upon *Stat.* 8 *El. c.* 4. it muſt be *clam* & *ſecrete*; in caſe of Murther, *ex malitia præcogitata*, otherwiſe Clergy allowable.

5. Conſequently a *Statute* taking away Clergy from the Principal, doth not thereby take it from the Acceſſories before, unleſs ſpecially provided for.

6. Where Clergy is allowable, it is to be allowed though the party be Convict by Confeſſion, Verdict, or ſtands Mute, or challenges peremptorily above 35.

2. *Particular Offences* where Clergy, and where not.

1. High *Treaſon* no Clergy.

2. In Petit Treaſon.

Principal ouſt of Clergy, if convict by Verdict or Confeſſion by *Stat.* 23 *H.* 8. *c.* 1. revived by 5 & 6 *E.* 6. *c.* 10. and by *Stat.* 25 *H.* 8. *c.* 3. though ſtanding Mute, not directly anſwering, or challenging above Twenty.

Not ouſt of Clergy in Appeal, unleſs Convict by Verdict or Confeſſion.

Acceſſories before the Fact maliciouſly, ouſt of Clergy in all caſes, by 4 & 5 *Ph.* & *Ma.c.*4.

3. Wilful *Murther* of Malice *præpenſe*, Principal ouſt of Clergy in all caſes by *Stat.* 23 *H.* 8. *c.* 1. 25 *H.* 8. *c.* 3. 1 *E.*6.*c.*12.

Acceſſory before maliciouſly, ouſted in all caſes, by 4 & 5 *Ph.* & *Ma.c.*4.

4. *Arſon*

4. *Arſon* of Houſes, or Barns full of Corn, Principal ouſt of Clergy in all caſes, *viz. ſur* Conviction by Verdict, or Confeſſion, by 23 *H.* 8. *c.* 1. upon ſtanding Mute, not direct anſwering, challenge above Twenty, by *Stat.* 25 *H.* 8. *c.* 3.

But Utlary ſtands ſubject ro Clergy.

Acceſſory ouſted of Clergy in all caſes by 4 & 5 *Ph.* & *M.* *c.* 4.

5. Simple *Burglary.*

Principal ouſted of Clergy if utlawed, Convicted by Verdict, or Confeſſion.

Not ouſted if ſtand Mute, challenge above Twenty, or not directly anſwering.

Acceſſory before or after not ouſt of Clergy.

6. Burglary, any perſon being in the Houſe, or put in fear or dread.

Prin-

Principal ouſt of Clergy in all caſes, *viz.* by *Stat.* 1 *E.* 6. 12. in caſe of any Conviction or Attainder; and by 25 *H.* 8. *c.* 3. revived by 5 & 6 *E.* 6. *c.* 10. it takes away Clergy where above Twenty challenged.

But Acceſſories not ouſted of Clergy.

7. *Robbery*, which hath ſeveral Qualifications, with theſe Conſiderations:

1. From the Perſon,

Without putting in fear, but *clam & ſecrete*: By *Stat.* 8 *El.* *c.* 4. Principal in all caſes ouſt of Clergy, Acceſſory not ouſt.

With putting in fear, Robbery in or near the High-way.

1. Principal in all caſes ouſt of Clergy, *viz.* if Appeal or Indictment by 23 *H.* 8. *c.* 1. Convict 23 *H.* 8. *c.* 1. Attaint 1 *E.* 6. *c.* 12. Mute, Challenge above Twenty by *Stat.* 25 *H.* 8. *c.* 3. revived by 5 & 6 *E.* 6. *c.* 10.

2. Ac-

2. Acceſſory before ouſt of Clergy in all caſes, by 4 & 5 *Ph. & Ma. c.*4.

2. From Dwelling-houſe; and this of three kinds:

1. Owner, Wife, or Servants being in the Houſe, or put in fear; here Clergy.

1. As to to Principal, taken away by 23 *H.* 8. *c.*1. in caſe of Conviction by Verdict, or Confeſſion, and by 25 *H.* 8. *c.* 3. Revived by 5 & 6 *E.* 6. *c.* 10. in caſe of ſtanding Mute, challenge *ultra* Twenty, not directly anſwering: Alſo to a Conviction in a foreign County, if it appear by Examination not to be within Clergy in the ſame County.

2. Acceſſory in all caſes ouſt of Clergy by *Stat.* 4 & 5 *Ph. & Ma. c.*4.

Nota, A Stranger in the Houſe brings it not within Statute.

2. Rob-

2. Robbing any perſon by day or night, any perſon being in the ſame Houſe, and put in fear.

Principal ouſt of Clergy by 1 *E.* 6. *c.* 12. in all caſes, but challenging Twenty; and by *Stat.* 5 & 6 *E.* 6. if in a foreign County Clergy upon Examination taken away.

Acceſſories, Clergy taken away by 4 & 5 *Ph.* & *Ma.* *c.* 4. in all caſes.

3. Robbing any perſon in his Dwelling Houſe, the Owner, his Wife, or Children being in any part of the Houſe, or within the precincts thereof; though there be no putting in fear. And this extends to Booths in Fairs.

Principal ouſt of Clergy by 5 & 6 *E.* 6. *c.* 9. in caſe where the Offender is found guilty.

Prin-

Principal thereof in other caſes ſhall have Clergy; as in ſtanding Mute, challenge *ultra* Twenty.

Acceſſory ouſt by *Stat.* 4 & 5 *Ph. & Ma.* c. 4.

4. Robbery to the value of 5 *s.* out of any Dwelling-houſe or Out-houſe thereunto belonging, though none in the Houſe, by *Stat.* 35 *El.*

Principal ouſt of Clergy in caſe of Conviction, not of ſtanding Mute.

Acceſſory ſhall have Clergy.

Un enter in le Lodging Sir H. Hungate *parcell de* Whitehall, *nul perſon eſteant in Lodging, mes in autre part de* Whitehall *& infreint un Chamber & priſt biens: Rule per adviſe de Juſtices,* 1. *L' Indictment doit eſtre pur infreindre de meaſon de Roy vocat'* Whitehall *& pur Embleer les biens Sir* H. H. *divers perſons eſteant in le meaſon: Car nient ſemble al Chamber in Inn de Court, lou cheſcun ad ſeveral property.* 2. *Que ceo fuit deins le* Stat. 5 & 6 E. 6. *& l'Inditement la accordant.* 3. *Que in Inditement ſur*

ſur Stat. 23 H. 8. *vel* 5 & 6 E. 6. *doit eſtre actual breaking & auxy Robbery.* 4. *Que ſi laron enter in meaſon le Doors open, & enfreint Chamber, & priſt biens, eſt deins le* Stat. 5 E. 6. *d'ouſter luy de Clergy.*

8. *Larceny* without any of theſe Circumſtances.

Horſe-ſtealing ouſt of Clergy, by 1 *E.* 6. *c.* 12. 2 & 3 *E.* 6. 33. Principal ouſt in all caſes:

Acceſſory ouſted in no caſes.

But other Larceny, not being Robbery nor Cut-purſe, have Clergy.

9. In *Rape*, Clergy ouſt by *Stat.* 18 *El. c.* 7.

10. Though the Offence be within Clergy, yet if he had formerly his Clergy, and were burnt in the Hand, the *Stat.* 4 *H.* 7. *c.* 13. ouſts him of Clergy, unleſs he were a perſon in Orders, and then he muſt produce his Certificate preſently, or by a time prefixed.

And ſee the *Stat.* 34 & 35 *H.* 8. *c.* 14. for the manner of the Certificate of ſuch Convictions and other Attainders.

And

And though *Stat.* of 32 *H.*8. *c.* 1. hath put men in Orders in the ſame condition with others, in reference to Clergy; yet as to this Point of the *Stat.* 4 *H.* 7. the Clauſe of the *Statute* 1 *E.* 6. *c.* 12. doth give a perſon in Orders his Clergy the ſecond time in all caſes, but in caſe of, 1. Challenge above Twenty: 2. Outlary.

3. *When* Clergy ſhall be *allowed.*

1. Now the uſe is not to put the party to challenge his Clergy till he hath pleaded, and the Inqueſt thereupon taken:
   1. For advantage of the party, if acquitted. St.PC.f.131.
   2. For advantage of the King for forfeiture, if Convict.
2. It may be allowed in Diſcretion, though the party challenge not.

Allowed under the Gallows, or where Judgment of *Paine fort & dure* given, or where challenge above Twenty.

V.

V. *Crom. Jur.* 126. *Allow ſouth Gallows per Juſt. B. R. mes nemy Gaol Delivery: Mes poent apres Judgment devant adjournment*, Dy.205.

Licet Ordinary retorn' non legit, *& eſt record, & repry al autre Seſſions, & tunc legit, avera benefit de ceo*, Dy.202. 34 H.6.49. Coron.20.

4. The *Judge*.

The Ordinary is but Miniſter, the Judge at Common Law is the Judge when and where to allow it, and of the Reading, 9 *E.* 4. 28. *Coron.* 32.

5. What the *Effect* of Clergy allowed:

1. In ancient time the Conſequent was delivery to the Ordinary, either to make Purgation, or *abſque Purgatione*, as the caſe required.

But by *Stat.* 18 *El.* c.7. now only Burnt in the Hand, which hath theſe effects;

1. Enables the Judge to deliver him out of Priſon; but yet if he ſee cauſe, he may detain him till he find Sureties of Good Behaviour.

And

And by the *Stat.* 3 *H.* 7. *c.* 1.

If Clergy within the year, he is to be Bailed or Committed at diſcretion, till the year paſt.

2. It gives him a Capacity to purchaſe Goods, and retain the profits of his Lands. *Foxley's* caſe, 5 Rep.

But the Goods he had at the time of the Conviction are forfeit.

3. It reſtores him to his Credit. *Hob.* 377. *Searle's* Caſe.

Le Stat. 25 H. 8. *que toll Clergy del perſons arrain in foreign County ſur examination extend ſolement al tiels Felonies d'ont Clergy ouſt per* Stat' 23 H. 8. *& nemy per ſubſequent* Stat. *Et pur ceo Rule in* Anne Coles Caſe: *Si feme infreint meaſon in County de* S. *in day time, & priſt biens ſouth value de* 10 s. *& eux import in County de* D. *& la arraigne, el ſerra arſe in maine: quia nul miſter in pavor come require per le* Stat. 23 H. 8.

Robbery de value de 10 d *& import in foreign County & la arrain eſt Petit*

tit Larceny, 2 Jac. More's Rep. *quia le* Stat. 25 H. 8. *extend ſolement al ceſtuy que demand Clergy, que n'eſt in caſe de Pet' Larceny.*

Indite de Robbery in quadam via pedeſtri, *avera Clergy: Car le* Stat. *parle de Robbery* in vel prope altam viam regiam. *T.* 38 *H.* 8. *More* 5.

Pleas

Pleas to the Felony.

1. DEmurrer.
2. Pleas in Abatement and Bar
3 The General Iſſue.

1: For *Demurrer.*

It amounts to a Confeſſion of the Indictment, as laid; and therefore if the Indictment good, Judgment againſt the Priſoner, and Execution. C. Weſt. 1. c. 12.

2. For Pleas *in Abatement.*

If Priſoner plead *Miſnoſmer* of his Sirname unto an Appeal, it goes in Abatement: But in caſe of Indictment, he ſhall be put to anſwer the Treaſon or Felony. St. PC. 181. 1 H. 5. 5.

But Miſnoſmer of the Chriſtian Names goes in Abatement; and if it be confeſſed by the King's Attorney, or found, the Indictment falls. 11 *H.* 4. *Coron.* 88.

But then he muſt give his true Name, and by that Name he may be forthwith Indicted.

Pleas in Bar.

Auterfoits acquit.

Auterfoits acquit:

1. If a perſon be acquitted upon an inſufficient Indictment or Appeal, yet upon a new Indictment he may be arraigned for the ſame Felony. 4 *R. Vaux*'s Caſe, *licet Judgment done.*

St.PC.105, 106.

2. *Auterfoits acquit* of one Felony, no Bar to an Indictment or Appeal of another Felony, &c. though committed before the Acquittal.

3. *Auterfoits acquit* as Principal, no Bar to an Indictment againſt him as Acceſſory to the ſame Felony after; But it ſeems he cannot be after indicted as Acceſſory before, *Stamf.* 105.

4. In an Appeal of Death or other Felony, *Auterfoits acquit*, upon an Indictment for the ſame Felony, was a good Bar in all Caſes; therefore if

if an Appeal was pending, the Court would ſurceaſe the Arraignment of the Priſoner upon an Indictment till it was determined: Or though no Appeal pending, yet in caſe of death would ſurceaſe till the year paſt.

But at this day *Auterfoits acquit* in an Indictment of Death no Bar to an Appeal, by *Stat.* 3 *H.*7. *c.* 1. for the Priſoner, notwithſtanding the Acquittal; but in other Appeals it ſtands a Bar to an Appeal.

5. But *Auterfoits acquit* in an Appeal, Bar to an Indictment of the ſame Felony.

1. Unleſs the Appeal be Erroneous in ſubſtance.
2. Or unleſs the Appeal be by a wrong Perſon.
3. Unleſs the Acquittal be by Battel; for in theſe caſes he may be indicted again.

6. He that pleads this Plea, need not have the Record *in poſſe*, becauſe it goes in Bar. 3 *E.*3. *B. Coron.* 217.

7. Though there be *Variance* between the Indictment, &c. yet if it be ſuch as may admit an *Averment*, to be the ſame, yet it may be pleaded.

Variance in the *Name*, if *Conus per un Name & auter.*

Variance in the *Day* of Felony ſuppoſed to be committed.

Variance in the *Place*, but by the Opinion of 4 *H.* 5. acquit of Larceny in one County no Bar in another.

Variance in l'Offence auterfoits acquit, attaint de Murther ou Manſlaughter turr' Petit Treaſon.

Auterfoits Convict or *Attaint.*

1. Where a Bar to the ſame Felony:

1. *Auterfoits attaint* of the ſame Felony in an Appeal Bar to an Indictment; for the Effect is obtained, the death of the party: But *vid.* no Bar in Appeal. *C.PC.*213.

2. *Auterfoits convict* by Verdict or Confeſſion of Manſlaughter in an Indictment and had Clergy, Bar in Appeal, though it be of Murther, for the Fact the ſame in both, though the Offences differ in degree. 4 Rep. 45. *Wigg's* caſe.

Auterfoits acquit ſur inſufficient Enditement, & nul Judgment done, n'eſt plea: Mes auterment eſt ſi Judgement ſoit done tanque ceo reverſ. Vauxe's Caſe, 4 Rep.

2. Where a Bar to an Arraignment for another Offence.

& PC. 107. 1. *Auterfoits attaint* of Felony, is no Bar to arraign him of Treaſon committed before the Felony for the King's Intereſt.

2. PC. 213. And it ſeems, if the Treaſon was committed after the Felony, then he ſhall be arraigned of the Treaſon, for the Offence is different.

2. *Auterfoits attaint* of one Felony, Bar to an Arraignment of Felony: But this hath theſe *Exceptions*,

1. Where the firſt Attainder is pardoned, there he may be arraigned for the former Felonies, though committed before.

& PC. 66, 107. 2. In caſe of Appeal he ſhall be arraigned at every one of their Suits, notwithſtanding he be attaint at one Suit.

The like it ſeems upon indictment of Robbery, becauſe by the *Stat.* the party is to have reſtitution.

3. *Auter-*

3. *Auterfoits convict*, and had Clergy after *Stat.* 25 *E.* 3. *c.* 5. had been a Bar to an Arraignment for another Felony, though not within Clergy. *Dy.*214.

But now by *Stat.* 8 *El. c.* 4. after Purgation, and 18 *El. c.* 7. after burning in the Hand, he ſhall be put to anſwer former Felonies not within Clergy, or for any offence after Clergy allowed.

And Note, That he that pleads a Plea in Bar to an Indictment or Appeal that confeſſeth not the Felony, ſhall plead over to the Felony; otherwiſe if it confeſs the Felony; as Pardon, or Releaſe.

Pardons.

3. PARDONS
Are either *of Courſe and Right*; ſuch are,

1. For a perſon Convict of Manſlaughter, or *Se defendendo.*

St.PC.102. 2. An Approver that vanquiſheth the Appellee.

Pardons *of Grace:*

1. Some things requiſite to their allowance *by Statute.*

1. By *Stat.* 13 *R.* 2. *c.* 1. Pardon of Murther, Rape or Treaſon muſt be eſpecially expreſſed in the Pardon, otherwiſe it ought not to be allowed in ſuch caſes. *Vide ſi extend al Petit Treaſon & Acceſſories*, 22 E. 4. 19. Lam. 293.

2 By *Stat.* 10 *E* 3. *c.* 2. there muſt be Surety of good abearing, otherwiſe the Charter void; but a ſpecial *Non obſtante* may prevent it.

2. Matter

2. Matter *at Common Law* conſiderable.

1. Charter of Pardon no Bar of an Appeal; and if the party be Utlawed in Appeal, and the King pardon, he ſhall have a *Scire facias* againſt the Appellor, who may pray Execution notwithſtanding ſuch Pardon; but if returned *Scire feci*, and appears not, then Appellee ſhall upon the Pardon be diſcharged.

2. Pardon of all Felonies is no Bar to Execution, if the Felon be Attaint; yet an Exception of all Burglaries excepts the Burglary for which the party is Attainted.

3. Pardon of all Attainders, not good with a pardon of the Felony.

4. The Pardon of Felony reciting in the Pardon that the party is Indicted, and in truth he is not, this is void.

5. The

C.PC. 337. 5. The King may Pardon the Burning in the Hand in Appeal, & *l'Impriſonment per ceo diſcharge.*

6. *S'il apres infreint Peace Scire fac' giſt a repealer le Pardon, & ſerra pendu pur primer Offence per le* Stat. 10 E. 3. 3 H. 7. 7. *viz. niſi ſoit non obſtante le* Stat.

7. *Pardon de tout Felonies per* A. & B. *vel eor' alter' commit' pardon ſeveral,* Dy. 34. 22 E. 4. 7.

Pleading the Pardon.

He that pleads a General Pardon by Parliament, wherein are Exceptions, muſt aver that he is none of the perſons excepted.

But of a General Pardon by Parliament without Exception, the Court *ex Officio* muſt take notice.

He that pleads a Particular Pardon,

1. Muſt ſhew it under Seal.

2. Muſt have a Writ of Allowance, *qu'il ad trove Surety ſom'*, Stat. 10 E. 3.

Mes

Mes lou nul brief d'allowance nul mort. 5 E.4.132.

3. If Variance, he muſt aver that the ſame perſon.

General

General Iſſue.

THUS far of Pleas in Bar upon Indictments or Appeals: Now we come to *Pleas to the Fact, Not Guilty.*

1. Regularly he that pleads any Special Matter in Bar in Caſes Capital, that confeſſeth not the Felony, notwithſtanding the Plea found againſt him, the Felony ſhall be enquired of, and therefore he ſhall plead over to the Felony.

2. The immediate *conſequent* of this Plea is *Trial*; and that is either,

By the Country.
By Peers.
By Battel.

Trial

Trial per Patriam.

1. CONcerning Trial *per Patriam*; and therein,
   1. Where Iſſues tried.
   2. What Proceſs againſt Jury.
   3. Before whom.
   4. Challenge.
   5. Evidence to be given.
   6. Verdict.

1. *Where* tried.

1. For Trial of *foreign Treaſons* and foreign Acceſſories, or ſtroke in one County, and death in another, *vide ſupra* in Indictments.

2. For Trial of *foreign Pleas* by *Stat.* 22 *H.*8. *c.* 14. made perpetual by 32 *H.*8. *c.*3. Foreign Pleas pleaded by a perſon indicted of Felony, and Triable by the County, ſhall be tried where the party is Arraigned; but it is now in Treaſon triable in the foreign County by virtue of *Stat.* 1 & 2 *Ph.* & *M.* *c.*

2. *Pro-*

2. *Proceſs againſt the Jury.*

1. *Nota*, The Juſtices of Gaol Delivery have their Pannel returned by the Sheriff, without any Precept, by a bare Award; but Juſtices of Oyer and Terminer not.

2. By good *Opinion*, the Juſtices of Peace, or Oyer and Terminer, cannot make their *Venire facias* to try an Iſſue retornable the ſame Seſſions; but Juſtices of Gaol Delivery clearly may.

St. PC. f. 155. 3. If ſeveral perſons Arraigned upon an Indictment or Appeal, and they ſeverally plead Not Guilty, the Plaintiff may take out one *Venire facias*, or ſeveral.

4. If the *Venire facias* be joynt, Challenge by one drawn againſt all.

Crom. 100. 5. Though Pannel be joynt, and *Tales* awarded, yet Court of Gaol Delivery may after ſever the Pannel to prevent that inconvenience.

6 In

6. In Appeal, if after Iſſue Plaintiff tries it not, a *Venire* by *Proviſo* may be for the Defendant; yet upon that *Venire* Plaintiff may have a *Tales*.

3. *Tales*.

1. If a full Jury appear not, or be challenged in Indictment or Appeal, the Plaintiff may have a *Tales*.

2. Upon Indictment or Appeal, becauſe Defendant may Challenge peremptorily, *Tales* may be granted larger than the Principal Pannel, as forty *Tales*, 14 *H* 7. 7.

3. But the ſucceeding *Tales* muſt be leſs than the former, unleſs the firſt be quaſhed, and then the ſame number with that which is quaſhed.

4. If any of the Jury die before ſworn, a new *Tales* grantable.

3. *Before whom?*

1. A *Niſi prius* not grantable where the King Party, unleſs prayed by his Attorney.

2. By *Stat.* 14 *H.* 6. *c.* Power to Juſtices of *Niſi prius* to give Judgment in Felony and Treaſon tried before them.

3. By *Stat.* 42 *E.* 3. *c.* 11. Enqueſt in Aſſiſe and Gaol Delivery may be taken before the Pannel returned in Court, but not in other Caſes.

Challenge.

4. *Challenge* of Array or Polls.

1. *Ex parte Regis*, by *Stat.* 33 *E.* 1. *c.* the King ſhall not Challenge without Cauſe; but yet he is not compellable to ſhew the Cauſe till the Pannel peruſed.

2. *Ex parte priſonarii*, the Challenge is either Peremptory, or upon Cauſe.

1. *Peremptory* Challenge.

1. A Peremptory Challenge not allowable, but where the life of a Priſoner comes in queſtion, and therefore not upon Collateral Iſſues.

2. At Common Law he might have challenged peremptorily 35 under three full Juries; and if he challenged above, he ſhould have Judgment to be hanged, 3 *H* 7. 12.

But by *Stat.* 22 *H.* 8. *c.* 4. made perpetual, by 32 *H.* 8. *c.* 3. it is reduced to 20; and now if he Challenge above 20, he ſhall not be therefore hanged, or forfeit, but his

C. PC. 227. Challenge Over-ruled, and he put upon his Trial; yet *vid. Statutes, ſemble contra.*

3. In caſe of Treaſon and Petit Treaſon, the Challenge of 35 reſtored by *Stat.* 1 & 2 *Ph.* & *M. c.* 10.

2. Challenge *for Cauſe*; we mention but three;

1. Cauſe of *Inſufficiencies.* By the *Stat.* 2 *H.* 5. *c.* 3. 40 *s. per Ann.* required in County; but this, as to Aliens, corrected by 8 *H.* 6. *c. ult.* in Cities by *Stat.* 23 *H.*8. *c.*13. Goods to the value of 40 *l.*

2. *Unindifferency.*

Indictor not to be of Jury by *Stat.*25 *E.*3 *c.*3.

3. In reference to an *Alien*, & *medietat' linguæ*, where

1. In no caſe Indictors ought to be *de medietate linguæ.*

2. In Treaſon trial *per medietat' linguæ repel per Stat'* 1 & 2 *Ph.* & *Ma. que ad repel* 28 *E.* 3. in that caſe.

3. In

3. In Appeal by an Alien against an Alien, no *medietat' linguæ.*
4. Scot no Alien, to have *Medietatem linguæ.*
5. The Jurors need not be of the ſame Nation, but any Aliens.
6. He that will have advantage of Trial *per medietatem linguæ* muſt pray it, otherwiſe he cannot have benefit by way of Challenge, *Dy.*304,357.
7. *Egyptians* excluded from the Trial *per* 1 & 2 *Ph.* & *Ma.c* 4.

Evidence.

5. *Evidence to the Petit Jury.*

1. In case of *Treason*,

There must be two Accusers or Witnesses by *Stat.* 1 *E.* 6. *c.* 12. & 5 *E.* 6. *c.* 11. and this notwithstanding *Stat.* 1 & 2 *Ph. & Ma. c.* 11. but only in case of Treason for Counterfeiting Coin.

These Witnesses must not be only by hear-say.

2. In case of *Felony.*

1. What allowed as Evidence:

1. By *Stat.* 1 & 2 *Ph. & Ma. c.* 13. & 2 & 3 *Ph. & Ma. c.* 10. the Justice hath power to Examine the Offender and Informer.

2. The Examination of the Offender not upon Oath, but Subscribed by him.

3. Examination of others must be upon Oath.

4. This must be certified by the Justices.

1. If it be but a ſmall Felony, to the Seſſions.
2. If it be a great Felony, &c. to the next Gaol Delivery.
5. Theſe Examinations, if the party be dead or abſent, may be given in Evidence.

But Prudence to have the Juſtice or his Clerk ſworn to the truth of the Examinations.

6. But Examinations, taken upon a Cauſe of Divorce for a forcible Marriage, not allowed to be read upon an Indictment upon 3 *H*7. for the ſame Marriage.

2. By whom.
1. *Wife*, or her Examination, not to be uſed for or againſt her Husband. Dalt. c. 111.
2. The Examination of an *Infant* of Thirteen, nay, of Nine allowed in ſome caſes.
3. One Attaint of Conſpiracy, Forgery, or Perjury, not allowed a Witneſs.
4. One duly ſet on Pillory. C.P.C. 219.

3. In what manner.

1. Evidence for the King always upon Oath.

C.PC. c.22. But Evidence for the Priſoner not upon Oath; yet no known Law that reſtrains it: But by ſome *Statutes* in ſome caſes, Evidence for the Priſoner upon Oath, as 31 *El.c.*4. 4 *Jac.c.*1.

The Confeſſion of the Offender taken upon Examination, Evidence with Oath not of the Informer.

4. Where Evidence maintains the Indictment.

1. If the Indictment be of a Felony, &c. at one *day*, though the Evidence be of another day, the Jury may find generally againſt Priſoner, and leave the perſon that is intereſted in point of time to falſify: Or the Jury may find the true day upon their Verdict, and then the forfeiture ſhall relate thither.

C.PC. 6.230.

3. If the Indictment lay the Felony at one *place*, the Evidence proving the Fact at another place

in

in the ſame County, maintains the Indictment.

3. If the Indictment and Evidence differ in *ſpecie mortis*, then it maintains it not: as Indictment of Poiſoning, Evidence of Stabbing maintains it not.

But if the Indictment be of poyſoning with one kind of Poiſon, and the Evidence of another; or of killing with a Dagger, and the Evidence is of killing with a Staff, yet it maintains the Indictment; for it agrees in ſubſtance and kind. C.PC.135. 9 Rep. *Matkally's* caſe.

The like of Acceſſories before, though the Poiſon or Weapon different.

4. Indictment that *A.* gave the mortal blow, and *B. C.* and *D.* were *præſentes & abbettantes*; Evidence that *B.* gave the blow, and *A. C.* and *D. præſentes & abbettantes*, yet it maintains the Indictment.

5. Indictment of *A.* as Acceſſory to *B* and *C.* Evidence proves him Acceſſory only to *B.* maintains the Indictment. 9 Rep. *Santhar's* caſe.

6. In-

6. Indictment of Murther, *ex malitia præcogitata*; Evidence of malice in Law, as killing an Officer, or without Provocation, yet maintains the Indictment.

7. Indictment upon *Statute* of Stabbing, 21 *Jac.* Evidence that the Dead ſtrook firſt, yet Evidence to maintain the Indictment for Manſlaughter generally, *H.* 23 *Car. Horwood's* Caſe.

8. Two indicted as Principals, Evidence proves one Acceſſory before, he ſhall be diſcharged of that Indictment, 26 *H.* 8. 5.

9. *Vid. Stat.* 21 *Jac. c.* 27. Mother endeavouring to conceal the death of her Baſtard-child, ſhall ſuffer death as in caſe of Murther, unleſs ſhe prove by one Witneſs that the Child was born dead.

Vid. Act. 17 *Car. in fine*, for the farther relief of His Majeſty's Army in the Northern parts. Act continued till end of next Seſſions; continued over till ſome Act of Parliament for their continuance or diſcontinuance.

Verdict.

Verdict.

6. VErdict in caſes Capital.

1. It muſt be given, and the Jury cannot be diſcharged till it be given. St.PC.165.

2. It muſt be given openly in Court, and no privy Verdict.

3. It may be found Specially; as an Indictment of Murther, the Jury may find him Guilty,

1. Of Manſlaughter:
2. *Per Infortunium:*
3. *Se defendendo.*

But then they muſt find the manner of it, that the Court may judge thereof; ſo for the value or the manner of the Larceny.

Trial by Battel, Peers.

NOw we ſhould come to Trial,

By Battel.

By Peers: *Vid.* the whole Proceſs thereof, *C.Pl.Cor.*27.

Judg-

Judgments in the ſeveral Caſes.

I. *IN High Treaſon:*

C. PC. 218, 219.

1. In all Caſes, except Counterfeiting Coin, Drawn, Hang'd, Entrails taken out and burnt, Head cut off, Body quartered, Head and Quarters hang'd up.

2. In Counterfeiting Coin, Drawn and Hang'd: *Iſſint per tonſure.* Dy. 230.

But the Judgment of a Woman in thoſe caſes, Drawn and Burnt.

II. *In Petit Treaſon:*

1. For a Man, Drawn and Hang'd.

2. For a Woman, Drawn and Burnt.

III. *In Felony.*

Hang'd till Dead: And this cannot be by the King altered to Beheading.

IV.

IV. *In Petit Larceny.*

To be Whipt.
He forfeits Goods.

V. *Death per infortunium.*

No expreſs Judgment; yet forfeits Goods.

VI. *Death Se defendendo.*

No expreſs Judgment; yet forfeits Goods.

VII. *Miſpriſion of Treaſon.*

Forfeits Goods; forfeits Profits of Land during Life; perpetual Impriſonment.

Vide for Seiſure of Goods.

1. Not before Indictment.
2. Nor removed before Attainder, 1 *R.* 3. *c.* 3.

Fal-

Falſifying Attainders.

1. By the Party, by *Writ of Error.*
2. By others *Falſifying* it.
   1. A Purchaſer may falſifie an Attainder of the Vendor by Utlary or Confeſſion in the point, if he purchaſe before the Attainder, and after the time of the Felony ſuppoſed
   2. A Purchaſer *Meſne* between the time of the Felony committed, and the Attainder by Verdict, cannot falſifie in the point of the Offence, but he may for the time.
   3. If the Attainder was by ſuch as had no good Commiſſion, the Party himſelf may falſify the Attainder. *Caſus Com. Leiceſt.*
   4. If the Principal attainted, and then the Acceſſory and Principal reverſe the Attainder, the Attainder of the Acceſſory is *eo ipſo* avoided, and his heirs may have *Mort danc'* againſt the Lord by *Eſcheat.*
   5. Attain-

5. Attaint of Treaſon, and then the Treaſon is pardoned by Act of Parliament, the party or his Heir ſhall falſify Attainder.

6. In Caſe of *Goods.*

1. *Fugam fecit* found by the Coroner cannot be falſified, though upon his Arraignment it be found he did not fly: But if the Indictment be void or inſufficient, no Forfeiture.

2. A man indicted before Juſtices of Oyer and Terminer, acquit by Verdict, and found he fled, and the particulars of his Goods found, they may be Traverſed. St.P.C. 184.

3. Default till *Exigent*, though after acquitted, Goods forfeited; for it is a *fugam fecit* in Law.

But if the Indictment, Appeal, or Proceſs inſufficient, the Forfeiture ſaved; ſo if it be reverſed by Error, or pardoned before *Exigent.*

Nota, Flight or *Exigent* in caſe of Petit Larceny, forfeits Goods.

Execu-

Execution and Reprieve.

C. PC. 212, 217.

1. THe Execution muſt be purſuant to the Judgment, and cannot be altered by the King, as from Beheading to Hanging.

2. But King may pardon part of the Execution; as in Treaſon, he may pardon all but Beheading.

3. It muſt be done by the proper Officer.

C. PC. c. 7. 217. St. PC. f. 198.

4. If a Woman, Convict of Treaſon or Felony, be quick with Child, ſhe ſhall have one Reprieve, but not a ſecond time.

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